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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1254

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO AND MARITIME LOCAL UNION NO. 8-801,

Petitioners,

v.

MOBIL OIL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners, Oil, Chemical and Atomic Workers International Union, AFL-CIO, and Maritime Local Union No. 8-801 thereof, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on November 8, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals *en banc* entered November 8, 1974 (Appendix A, pp. 1a-36a, *infra*) is reported at 504 F.2d 272. The opinion of the original panel entered August 10, 1973 (Appendix B, pp. 1b-16b, *infra*) is reported at 483 F.2d 603. The District Court's Findings of Fact and Conclusions of Law are reported at 81 LRRM 2051.

JURISDICTION

The original decision of a panel of the Fifth Circuit was entered on August 10, 1973. Pursuant to timely motion of Respondent Mobil, rehearing *en banc* was granted and decision of the *en banc* court was entered November 8, 1974. On January 20, 1975, Mr. Justice Powell granted an extension of time until April 7, 1975, for the filing of this Petition. Jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether under Section 14(b) of the Taft-Hartley Act and the Texas "Right to Work" laws a union security provision in the form of an agency shop clause may apply to seamen who work exclusively aboard oceangoing vessels which move between Texas and non-Texas ports?

2. Whether the courts below should have withheld declaratory judgment in favor of referral to the National Labor Relations Board for the initial decision in accommodating Sections 14(b), 8(a)(3) and the Texas "Right to Work" laws?

STATUTES INVOLVED

The pertinent statutory provisions, Sections 14(b) and 8(a)(3) (29 U.S.C. §164(b) and 158(a)(3)) of the

Labor-Management Relations Act, 1947, and the Texas "Right to Work" statutes, Articles 5154g, 5207a and 5154a, Vernon's Annotated Civil Statutes, are set forth in Appendix C, pp. 1c-2c, *infra*.

STATEMENT

Respondent, Mobil Oil Corporation, negotiated a labor contract with Petitioner unions. It then sued the unions for declaratory judgment that the agency shop clause of the contract is illegal under section 14(b) of the Taft-Hartley Act and the Texas "right to work" law. The District Court declared the clause illegal, holding the Texas act does apply. On original submission, a panel of the Court of Appeals held that the Texas act does not apply and reversed by a 2-to-1 vote. On rehearing *en banc*, the Court held, by an 8-to-6 vote, that the Texas act does apply, Judge Goldberg not participating.

The covered employees are blue-water seamen who work exclusively aboard ship on Mobil's eight oceangoing tankers which move typically between Texas and New York and other Atlantic coast states but often move between non-Texas ports and even in foreign commerce. When vessels do travel to Texas they are present in the port of Beaumont only 5.5% of the total time. Eight times a year a vessel travels between the east coast and Puerto Rico without touching Texas. At the time of trial, one of the vessels was en route to Guam on a six-month charter and had not been to Texas in 50 days. All vessels are located on the high seas or in non-Texas ports 80% to 90% of the time. Fifty-seven percent of the seamen are residents of states other than Texas, while 43% are Texans. (App. 25a) The declaratory judgment adjudges that the application of the agency shop clause to "any or all" of these seamen contravenes the Texas statutes. 81 LRRM 2053.

Mobil is a New York corporation, with top corporate offices in New York. Since 1942, labor contracts covering this bargaining unit have been negotiated in New York. The instant contract was negotiated and signed in New York, then typed in final form and re-executed partly in Texas.

Mobil's marine transportation system is operated by its Maritime Transportation Department, which is headed by its Gereral Manager, and below him, by its Manager of U. S. Operations, all located in New York. Below this level is the Manager of Gulf-East Coast Operations, who offices in Beaumont, Texas and who heads up the "Gulf-East Coast Operations" which is also located in Beaumont.

Until 1962 "Gulf-East Coast Operations" was also headquartered in New York but in that year it was transferred to Beaumont. The transfer of this intermediate level of management and operations gave rise to numerous contacts between Mobil and Texas so that, according to the *en banc* majority, Texas is now "intimately involved" with this employment relationship and has "employer/employee contacts" which far outweigh those of any other state. The Court tallied these contacts as set out below which it evaluated "qualitatively", *not* "quantitatively"—in the Court's words—to determine whether application of the Texas law "would be in furtherance of the Taft-Hartley Act's expressed purposes." (App.6a-7a)

The Court reached its affirmative answer by divining and following a non-existent congressional policy which it thought prompted Section 14(b). The Court correctly noted that the Taft-Hartley Congress was pointedly concerned with abuses in the initial hiring of employees, especially in

the maritime industry, but then, grossly misreading legislative history, it deduced that Section 14(b) is the result of that concern and a tool selected by Congress to correct that problem. Thus it concluded that it should overrule the panel majority's adoption of the job situs test for this deep sea bargaining unit because it does not effectuate congressional policy relating to the initial hire of employees. In so doing, the Court passed without comment the clear, accurate demonstration by the minority opinion that it was Section 8(a)(3) of the Act, not section 14(b), that Congress adopted to regulate initial hiring of employees. (App. 27a-30a)

The majority considered and likewise rejected the job situs test adopted by the National Labor Relations Board in multi-state situations.[1]

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1. In union shop election procedures in multi-state situations, the National Labor Relations Board adopted the job situs test to reach accommodation between different state laws and between sections 8(a)(3) and 14(b). Where employees of a single company worked in many states, some of which prohibited union security, the Board designed separate, appropriate bargaining units according to the job situs of employees, thereby applying the law of each state to the employees who worked in that state. One benefit of this test, noted by the Board, was that it results in the least amount of extraterritorial effect being given to the laws of one state as against those of another. *Northland Greyhound Lines, Inc.*, 80 NLRB 288 (1949).

In another case, the company was headquartered in New York, but its employees were mobile equipment installers who worked in 45 states and were frequently transferred from state to state and who, therefore, worked in right to work states from time to time. The Board rejected the claim that the New York location of company headquarters should make New York law applicable to entire operation, adhering instead to the job situs test. It held that each employee of the company would be considered subject to the law of the state in which his job site was located on the eligibility date. *Western Electric Co., Inc.*, 84 NLRB 1019 (1949).

The Board's decisions were distinguished by the *en banc* majority on the narrow basis that they concerned *which* state law applied and did not reach the issue at bar (App. 5a), a distinction that Chief Judge Brown found insufficient to cause rejection of the job site test. (App. 34a)

Section 8(a)(3) of Act authorizes agreements making union membership a condition of employment "on or after the thirtieth day following the beginning of such employment. . . ." (App. 1-2c) The section equally authorizes union shop and agency shop. *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). The challenged contract clause provides:

> "For the duration of the Agreement all employees hired shall, as condition of employment, become members of the union and/or in the alternative pay the regular union dues and initiation fees within 31 days from the employment date.

There was no claim or finding that the clause is not in accord with section 8(a)(3) of the federal act, but rather that it is void and unenforceable under Texas right-to-work statutes.

The Majority Opinion

Judge Thornberry's opinion develops six points which we summarize and paraphrase closely to disclose the reasoning:

1. The decisions of the NLRB in the *Western Electric* and *Northland Greyhound* cases adopted the job situs test in determining the appropriate bargaining units for union security purposes where employees performed their work in many states. However, the issue in those cases was *which* state law applied, not whether *some* state law applied to the employment relationship. Thus, the exact question now before the Court was aborted in those cases.

2. Texas has "quantitatively and qualitatively" greater contacts with this employment relationship than does any other state, including New York. (App. 4a, Fn. 3) This stems from the Beaumont, Texas location of headquarters where personnel and payroll records are maintained, payroll checks are written and mailed, state and federal taxes are deducted from wages, union dues are checked off and grievances are submitted and considered. Texas administers unemployment compensation. A more substantial part of the administration and performance of the labor contract occurs in Texas. 123 of 289 seamen reside in Texas; 152 of the 189 list Beaumont as their shipping port; final hiring and termination decisions are made in Beaumont. (App. 3a-4a)

The number of contacts is a highly relevant consideration, but the true importance of these contacts is to be understood not in a quantitative vacuum but in the qualitative background furnished by Congress. "Our job is not to add up all of the contacts and to decide which jurisdiction has the 'most.' Our task is to discern whether application of the Texas right-to-work law would be in furtherance of the Taft-Hartley Act's expressed purposes." (App. 6a-7a)

3. When the Congress prohibited the closed shop while permitting the union shop in the Taft-Hartley Act, the Congress was demonstrating its concern with the process by which persons were hired. The maritime industry, with its hiring halls, was singled out by Congress as a serious problem area in which employer freedom in initial selection of employees was unduly limited. In short, Congressional discussion on compulsory unionism focused not

on "job situs" but on the hiring process. And, the language of section 14(b) which looks to the "execution or application" of Union security agreements, refutes the notion that Congress was concerned with job situs rather than "the effects of such an agreement on men and women seeking employment in a mobile society." (App. 9a-13a)

4. The Texas statute is triggered by the act of hiring within the state. The state statute does not focus on job situs or place of job performance. This is consistent with the language and intent of section 14(b). The fact that 60% of job applicants come from Texas gives Texas good reason to apply its right-to-work law. (App. 15a) During their off-duty or "vacation" periods, Texas employees live and act like other Texas citizens. These are precisely the people the Texas law was designed to protect. (App. 15a)

5. In 1951 Congress amended the Railway Labor Act, 45 U.S.C. §§ 151 et seq. to authorize union shop agreements "notwithstanding" "the law of any state" but it there used express language to defeat application of state law. This instance of Congressional action demonstrates that state right-to-work laws are not to be ignored unless the language or legislative history of the federal law permits such a course. (App. 19a) To carve out an exception here for seamen without suggestion to do so from Congress would encroach upon legislative authority. (App. 20a) Nothing suggests that Congress intended to create a special rule for maritime workers. (App. 18a)

6. During the House debate on Taft-Hartley, passing reference was made to the McCarran Act, 150 U.S.C. §§ 1011, et seq., in which Congress declared that activities of insurance companies are subject to state regulation. While the legislative history of the McCarran Act suggests an intent to limit the extraterritorial application of state laws, there is nothing to that effect in the legislative history of the Taft-Hartley Act. The Supreme Court has permitted state regulation of maritime insurance contracts which clearly have an extraterritorial effect. *Wilburn Boat Co. v. Firemen's Fund Ins. Co.*, 348 U.S. 310 (1955) (App. 13a-14a, fn. 12)

Minority Opinion

Joining issue squarely, Judge Ainsworth's dissent is based upon the following points which we summarize:

1. The majority points out that Congress carved out no exception for seamen but fails to discern that seamen have traditionally occupied an exceptional status in regard to the regulation and control of their employment by maritime and federal statutory law and not by state law, and section 14(b) cannot reasonably be construed to remove them from that category. Federal statutory and maritime law controls all rights and restrictions flowing from the seaman's employment. Seamen are wards of admiralty, with special status and protection. Hiring, discharge and various terms of employment are regulated by shipping articles mandated by federal statute. Compensation for illness, injury, disability and death are covered by maintenance and cure doctrine or by Jones Act or Death on High Seas Act. Federal maritime law

covers the gamut of the seaman's employment relationship including wages, maritime liens for collection thereof, protection against attachment or assignment of wages, payment of one-half of unpaid wages in every port, double wages for wrongful withholding, physical qualifications and disciplinary problems. In practical effect, state regulation of this employer-employee relationship stops at the water's edge. State law may not properly control except for the novel injection of Texas right-to-work law here. (App. 25a-27a)

2. As the majority opinion emphasizes, Congress was in truth concerned with the adverse impact of compulsory unionism on the hiring process but section 14(b) was not designed to be the remedy for these ills, as the majority suggests. Rather, the legislation history of the Taft-Hartley Act shows that Congress designed section 8(a)(3), 29 U.S.C. § 158(a)(3), to solve problems in the hiring process by eliminating prior union membership as an employment condition and by excluding new employees from union shop requirements during the first 30 days of employment. (App. 28a-29a) This agency shop clause avoids the evils in the hiring process consistently with Congress' prescribed method. Its enforcement is in keeping with federal labor policy expressed in sections 7 and 8(a)(3) of the Act.

On the other hand, section 14(b) was inserted into the Taft-Hartley Act merely to restate preexisting law, not to expand the jurisdiction of states relative to employment conditions of maritime workers. The original Wagner Act itself had not been intended to override state laws regulating the closed shop. (App. 28a; Fn. 16)

3. The consistent and traditional control by federal law of maritime employment relationships and contracts refutes the proposition that Mobil's contacts with Texas justify injecting state law into maritime affairs. The original majority panel decision is correct and should be reaffirmed. (App. 31a) Job situs of employees is the most important and logical factor for these employees whose principal place of employment is on the high seas. Use of the employer's headquarters as the decisive criterion could cause bizarre consequences. In this case, the change in headquarters from New York to Beaumont did not substantially change the employment of the men. (App. 30a-31a)

4. The State itself has not been sufficiently concerned to invoke its laws or intervene in this case. Employer is seeking to avoid its own contract by vicarious assertion of Texas law. (App. 30a)

5. The result reached by the majority is somewhat impractical. The attempt of the majority to give extraterritorial effect to Texas law at the behest of Mobil fails in soundness and logic. None of the employees works in Texas. Fifty-seven per cent of the employees do not even reside in Texas. (App. 31a) The majority opinion does not explain how Congress could fairly be said to have intended that a New York employee of Mobil, who resides in a state where his employment contract was entered into and where agency shop provisions are permissible, and who performs no work whatever in Texas, should be prohibited by Texas law from enjoying the benefits of an agency shop provision in his employment contract. (App. 30a), Fn. 21)

Concurring Dissenting Opinion

Chief Judge Brown, joined by Judge Dyer, concurred in the dissent by Judge Ainsworth and added these points:

1. The majority opinion starts and stops with the tacit assumption that the Court must find *some* applicable state law—almost in a conflict of laws analysis. The basis of such assumption is not discernible in the Act or its legislative history. The emphasis of the Act is that union security agreements are of such importance that, absent state law outlawing union shop employment relationships with that state, they will be favored.

2. The job situs rule, though never before applied in precisely this situation, is merely a logical distillation of section 14(b). For that reason, it should be followed here. The Board's decisions in *Northland Greyhound* and *Western Electric* are highly relevant. (App. 34a, Fn. 6)

One benefit of the job situs test noted by the NLRB was that it would diminish the extraterritorial effect of the laws of any one state.

3. It would be better administration and more consistent with sound legal principles for the Court to refer this case to the NLRB under the doctrine of primary jurisdiction. Where 57% of the employees covered by this agreement are not Texas residents, further findings of fact and exploration of alternative remedies would certainly appear to be mandated. The Court is trying to divine congressional policy never before faced in accommodating sections 8(a)(3) and 14(b). That policy should be explored first by the agency charged with responsibility for administering the Act.

REASONS FOR GRANTING THE WRIT

1. The question is one of "exceptional importance", as all the judges below recognized. Five of the six states within the Fifth Circuit, all with coastal areas, have "right to work" laws. (App. 2a, Fn. 1) Twenty-four states contain Atlantic, Pacific or Gulf coastal areas, eight of which have such laws,[2] while sixteen coastal states expressly authorize union security contracts within their borders or impliedly permit them.[3] 500 American flag vessels manned by approximately 10,000 seamen commute between ports in these states or from them into foreign commerce.

2. This decision ensnarls in state "right to work" laws labor contracts covering all American flagships in coast-wise or foreign commerce if the vessels move between "right to work" states and other states or nations. The opinion expressly holds:

> "The fact that maritime work is interstate, or even international, in character does not imply that Texas law is inapplicable. . . ." (App. 16a)

And, further, by holding that the application of "right to work" laws promotes the Taft-Hartley Act's objective of curing abuses in the original hiring of employees, especially in the hiring halls of the maritime industry (App. 5a-6a; 10a-13a, the decision exalts the laws of "right to work" states over those of other states and practically decrees that they be given preferred status or reach, in comparison to the laws of other states. The decision is an

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2. Texas, Mississippi, Alabama, Florida, Georgia, South Carolina, North Carolina, and Georgia.

3. Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, Pennsylvania, New Jersey, Delaware, Maryland, Louisiana, Washington, Oregon, California, Hawaii, and Alaska.

invitation to the many eager partisans in this controversial area to litigate in the interest of stretching the reach of "right to work" laws. For the first time right-to-work supporters will be armed with a decision that federal policy is promoted by a generous application of state right -to-work laws, if the ruling below is left to stand.[4]

3. The decision invites conflict, forum shopping, and races to the courthouses of different states by interpreting section 14(b) to authorize extraterritorial operation of one state's law even to the point of intrusion into another state. In this very case, why would not a New York court be equally justified in holding that New York contacts with this employer-employee relationship are also sufficient to support extraterritorial application of its own statutory law and policy to this case, especially since it is the chartering state of Mobil and site of Mobil's home office where final authority over bargaining, operational, and hiring matters rests and is exercised and where so many of these seamen reside? Explicit invitation for extraterritorial conflicts is inherent in the broad assertion of the majority opinion that:

> "The language and history of section 14(b) suggests that a state may apply its right to work law whenever the state has a significant interest in the process by which a union security agreement is applied." (App. 13a-14a)

4. The court below was favored with an *amicus curiae* brief from the National Right to Work Legal Defense Foundation but not even that able and diligent group suggested that section 14(b) is a congressional tool to regulate hiring through state action. Nor did Respondent Mobil make such a suggestion to the court. Undersigned counsel does not find in legal literature any analysis or discussion of the role of section 14(b) along the lines of the holding in this case.

This is the parlance of due process where the jurisdictional reaches of state courts may and do frequently overlap, but it is somewhat inapposite to sections 8(a)(3) and 14(b) which look to the accommodation of state laws to each other and the avoidance of impingement by one state policy upon another state.

4. The majority fell into fatal error in attributing to section 14(b) a role in the elimination of abuses in hiring resulting from closed shops or hiring halls. (App. 11a-14a) Not one word of the legislative history accords to section 14(b) or to state law this role or any other function in the hiring process. To the contrary, as the minority demonstrates by citation of chapter and verse in the clear legislative history made by Senator Taft himself, it was section 8(a)(3) with its proviso that was designed by Congress to eliminate the abuses of the hiring monopoly of the closed shop system. Section 8(a)(3) removes as a matter of federal law prior union membership as a prerequisite to hiring and provides as a matter of federal law a thirty-day delay before a new employee may be subjected to union shop requirement. (App. 29a-30a) By adopting section 8(a)(3) in this form Congress established two complementary principles of federal law: first, union membership must not be a prerequisite to the act of hiring and for 30 days thereafter, but second, union membership may be made such a prerequisite after 30 days of employment. Obviously, the act of hiring is controlled by federal law, and the states are not left with an option under section 14(b) to permit

or not to permit union membership to be a prerequisite to hiring.[5]

Beyond the act of hiring Congress did accord to the states an option under section 14(b) to allow or to prohibit union security but at the same time Congress rejected right-to-work as an element of federal policy. An amendment by Senators Ball of Minnesota and Byrd of Virginia sought to eliminate the proviso of section 8(a)(3), 2 Leg. Hist. L.M.R.A. 1418. Senator Ball argued that union security should be abolished as a matter of federal law as it had been by some 13 or 14 states at that time. (Ibid 1418-1420) In reply, Senator Taft successfully defended the proviso of section 8(a)(3) as follows:

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5. Congress was very conscious of the mandatory nature of its own limitations on union security even while it accorded to the states options to permit or prohibit union security above and beyond its own limitations. *See, e.g.,* House Report No. 245 on H.R. 3020, 1 Leg. Hist. L.M.R.A. 325:

> "Agreements such as those that section 8(d)(4) permits are valid only if they are valid under the laws of any State in which they are to be performed, and by section 13 the United States expressly declares the subject of compulsory unionism one that the States may regulate concurrently with the United States, notwithstanding that the agreements affect commerce, and notwithstanding that the State laws limit compulsory unionism more drastically than does Federal law. It goes without saying that no State may invalidate, as to agreements affecting commerce, restrictions or conditions that the amended Labor Act will put upon compulsory unionism."

> "We considered the [right-to-work amendment] arguments very carefully in the committee and I myself came to the conclusion that since there has been for such a long time so many union shops in the United States, since in many trades it was entirely customary and had worked satisfactorily, I at least was not willing to go to the extent of abolishing the possibility of a union-shop contract. . . . I think it would be a mistake to go to the extent of absolutely outlawing a contract which provides for a union shop, requiring all employees to join the union, if that arrangement meets with the approval of the employer and meets with the approval of a majority of the employees and is embodied in a written contract." (Ibid 1420-1422)

The Ball-Byrd right-to-work amendment was defeated and the section 8(a)(3) proviso was left intact. (Ibid 1428) In summary, legislative history leaves nothing to the imagination. Section 8(a)(3) was adopted to control by federal law the act of original hiring. Congress rejected right-to-work policy as a matter of federal law but did preserve state option to allow or not to allow union security arrangements after 30 days of employment.

Evidently it seemed to the majority that vesting in section 14(b) the role of regulating hiring would provide a predicate to legitimize the application of Texas law to maritime workers as a furtherance of this discovered federal policy. And being without statutory language or legislative history to so recast section 14(b), the majority accomplished a verbal transition thus:

> "In short, if the congressional discussion on compulsory unionism could be said to have any single reference point, it is not job situs but the hiring process. And in our judgment the language of section 14(b) which looks to the 'execution or application' of the agreement requiring membership as a condition of employment refutes the notion that Congress was suddenly singularly concerned with the job situs of the employee rather than with the effects of such an agreement on men and women seeking employment in a mobile society." (App. 12a-13a)

Petitioners submit this is rhetoric which evaporates upon rereading. It does not connect section 14(b) and state law to the regulation of hiring and certainly does not support the expansive extraterritorial application of the Texas act in the name of promoting federal statutory policy. We repeat: If this is section 14(b) policy, courts must accord broader application to the laws of "right to work" states than to those other states. However bizarre this inference may be, it is an integral part of the decision below.

In fact, section 14(b) was inserted to preserve pre-existing law and to insure that the then new section 8(a)(3) would not be taken as a negation of state laws which go further. *Retail Clerks, etc. v. Schermerhorn*, 373 U.S. 746, 751 (1963). It was not inserted to expand the jurisdiction of states so they can protect hiring everywhere, as the minority opinion demonstrates. (App. 28a, Fn. 16)

Given the special congressional concern for emancipating the initial selection of employees from abuses, we can hardly attribute to Congress the intent to delegate the section 14(b) option to states to correct or not to correct the problem. Neither can we imagine that Congress intended to invest in "right-to-work" states special long-arm writs to regulate hiring in other states. But the opinion below well-nigh attributes these purposes to Congress.

5. Union security to the extent authorized by section 8(a)(3) is a mandatory subject of bargaining under section 8(a)(5) of the Act in the absence of a prohibiting state law. *NLRB v. General Motors Corporation*, 373 U.S. 734 (1963). The decision below is in conflict with the *General Motors* decision to the extent that it holds that the Act, especially section 14(b), favors state prohibition of union security arrangements. Congress would hardly have made union security a mandatory subject of bargaining while at the same time creating section 14(b) in order to further a federal policy of eliminating union security. The *General Motors* decision necessarily means that the Act is neutral whether or not a state prohibits union security beyond the limitatations of section 8(a)(3), and where it does not, the Act gives to employees the affirmative right to seek union security arrangements and compels the employer to bargain about them in good faith.

6. The majority attached little importance to the exclusively maritime situs and nature of the work. "[W]hat is the interest of the high seas in preventing application of the Texas law?", the Court asked. (App. 16a) But as the minority demonstrates, federal maritime and statutory law is pervasive in its regulation of the employment relationship aboard deep sea vessels, while state regulation stops at the water's edge. See, e.g., *Garrett v. Moore-*

McCormack, 317 U.S. 239, 246-248 (1942) (Pennsylvania state law is not applicable in action to set aside seaman's release); *The Arizona v. Anelich*, 298 U.S. 110, 122-123 (1936) (Common law defense of assumption of risk is not applicable under Jones Act); *Socony-Vacuum Co. v. Smith*, 305 U.S. 424, 430-431 (F.E.L.A. safety appliance rules are not appropriate to admiralty). As the minority states, there is no aspect of this employment relationship which Texas may properly control—except this novel injection of Texas "right to work" law into this labor contract. (App. 25a-27a) Thus, the majority did not make a weighty point by pointing out that Congress did not carve out an express exception for seamen in passing section 14(b). Rather, seamen working aboard ship already occupied an exceptional status under the maritime law and federal statutes and it is inconceivable that Congress intended section 14(b) to expand state law into a field entirely foreign to the states' normal field of operation. The consistent and traditional control by federal law of every phase of maritime employment relationships refutes the holding below that Mobil's contacts with Texas justify injecting state law into federal maritime affairs. (App. 31a)

7. The job situs test adopted by the NLRB is appropriate to this case and should not have been rejected by the majority. In administering the union shop election procedures, the Board has encountered multi-state situations in which employees of a single company performed their work in many states, some of which prohibited union security agreements. The Board designed appropriate bargaining units of employees according to the situs of their work, thereby applying the law of each state to the employees who worked in that state. One benefit of this test, according to the Board, is that it results in

the least amount of extraterritorial effect being given to the laws of one state as against those of another. *Northland Greyhound Lines, Inc.*, 80 NLRB 288 (1949). *Western Electric Co., Inc.*, 84 NLRB 1019 (1949). In the *Western Electric* case, the employer was headquartered in New York but its employees were mobile equipment installers who were frequently transferred from state to state and who, therefore, worked in right-to-work states from time to time. The Board rejected the claim that the New York location of employer's headquarters should make New York law applicable to all employees for union security purposes.

Thus, two sharp conflicts emerge between NLRB decisions and the opinion below. *First*, the Board adopted the job situs test in order to accord equal respect to the laws of all states and avoid extraterritoriality, while the decision below concludes that extraterritoriality is unobjectionable under section 14(b) (App. 13a-14a, Fn. 12), and, indeed, appropriate in order to further federal policy.[6]

Second, the Board adhered to the job situs test and refused to accord decisive weight to the location of employer's New York headquarters and contacts in the *Western Electric* case while the decision below makes the opposite choice on practically identical facts.

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6. It was an enormous assumption made by the Court that Texas intends these particular statutes to have extraterritorial effect. The Texas Supreme Court follows the rule of statutory construction that extraterritorial effect is not to be given statutes by implication. To the contrary, a state statute is presumed to have no extraterritorial effect unless a legislative intention to reach beyond the limits of the state is clearly expressed or indicated by its language, purpose, subject matter or history. *Marmon v. Mustang Aviation, Inc.*, (Tex.) 430 S.W.2d 182, reh. den. The Texas court cited and followed this Court's decision to the same effect in *Foley Bros. v. Filardo*, 336 U.S. 281 (1949). Nothing in the Texas statutes or their wording suggests a legislative intention to reach beyond the state's borders. (App. 1c) The state and its officials took no part in this case.

8. The decision is impractical and unrealistic. The declaratory judgment goes so far as to say that the application of the agency shop clause "to any or all of plaintiff's operations and employees contravenes the Texas statutes. . . ." As the minority opinion points out, it is not explained how Texas law can cover seamen who work aboard vessels which ply the high seas and 57% of whom are not even Texas residents. (App. 31a) While emphasizing the Texas residence of some of these seamen, the court disregards the out-of-state residence of most of them. The contacts between Texas and Mobil's headquarters in Beaumont, Texas, have little relevance to the work life of the employees. As the panel majority pointed out, the transfer of these headquarters from New York to Texas in 1962 had little effect on the seamen whose working location remained the same. (App. 12b) In this case, what difference would it make to the seamen if headquarters is transferred back to New York?

Furthermore, "headquarters" can be invidiously manipulated. Without significant effect on employees or their place of work employers can artificially concentarte management or administrative functions in right-to-work states in order to defeat the union security right of their employees who work in other states. Or, to put another case, companies and unions could agree that contract administration and grievance settlement would take place in states which authorize union security. Would anyone imagine that employees who work in right-to-work states could thus be subjected to union security? Here we see that when the shoe is applied to the other foot it will not fit. Obviously, the headquarters location of the employer accepted without reference to the work place of the men is not a rational measure for the application of section 14(b). On the other hand, the job situs test is the "logical distillation" as section 14(b) as Chief Judge Brown put it. (App. 34a)

9. Finally, Petitioners direct attention to the failure of the Court to refer the case to the NLRB under the doctrine of primary jurisdiction. 12 of the 14 judges rejected Petitioners' argument in this respect, but Chief Judge Brown and Judge Dyer thought the case is governed by *Southwestern Sugar & Molasses Co. v. River Terminals Corp.*, 360 U.S. 411, 421 (1959). We preserve the point for this court's consideration.

Plaintiff Mobil requested and needed only declaratory judgment, itself a discretionary remedy. The case requires an accommodation between sections 8(a)(3) and 14(b) as well as between federal and state law. The NLRB arsenal of weapons to deal with union security problems is complete[7] and "any person" may invoke its procedures under its rules. N.L.R.B. Rules and Regulations, Sec. 102.9.

At the very least the court should have had the benefit of the initial determination and analysis by the statutory agency entrusted with administration of the Act. We daresay the misinterpretation of legislative history which did occur would have been avoided, and the judges would have been materially assisted by having the views of the

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7. Before negotiation of a union security clause, NLRB has exclusive jurisdiction to rule upon the legality of a clause proposed in bargaining, *NLRB v. General Motors, supra*, and to prevent picketing to obtain an illegal clause, *Local 1625 Retail Clerks, etc. v. Schermerhorn, supra, on reargument*, 375 U.S. 96 (1963) at 105.

After execution of a contract, NLRB has jurisdiction to rule on the validity of a union security clause, *American Seating Co.*, 98 NLRB 800 (1952); *NLRB v. Television & Radio Broadcasting Studio Employees*, 315 F.2d 398 (C.A. 3, 1963), or to expunge an invalid union security clause, or to redress the discharge of an employee either under an invalid clause or under unlawful circumstances, *NLRB v. Hribar Trucking, Inc.*, 337 F.2d 414 (C.A. 7, 1964); *Busch Kredit Jewelry Co.*, 108 NLRB 1214 (1954); *Film Editors*, 124 NLRB 842 (1959); *Argo Steel Construction Co.*, 122 NLRB 1077 (1959); *Associated Machines, Inc.*, 114 NLRB 390 (1955), *enforced* 239 F.2d 858 (C.A. 6, 1956).

NLRB before them. The point has been recognized by this Court in a closely related situation: "There is much force in the argument that the assessment of any union security arrangement for the purposes of §§ 7, 8 and 14(b), when there is significant doubt about the matter, is in initially a task for the Board, so that it may come to this court with the benefit of the affected agency's views . . ." per White, J. in *Retail Clerks Int. Ass'n. v. Schermerhorn,* 375 U.S. 96 (1963).

The courts below not only disregarded relevant NLRB decisions and bypassed the NLRB in a complicated case of first impression, but they did so upon what they regarded as an incomplete record. (App. 21a)

The result is that further refinements in the ruling, if any are appropriate, have been precluded. Indeed, by invalidating the union security clause as to "any or all" of the seamen, the declaratory judgment has also precluded in practical terms further exploration of the problem in collective bargaining.

We suggest to the Supreme Court that further consideration of the primary jurisdiction question is appropriate.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MOBIL OIL CORPORATION et al.,
Plaintiffs-Appellees,

v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO et al.,
Defendants-Appellants.

No. 72-3272.

United States Court of Appeals,
Fifth Circuit

Nov. 8, 1974.

Judgment of district court affirmed.

Ainsworth, Circuit Judge, filed a dissenting opinion in which Brown, Chief Judge, and Dyer, Simpson, Morgan and Roney, Circuit Judges, joined.

Brown, Chief Judge, filed a dissenting opinion in which Dyer, Circuit Judge, joined.

Appeal from the United States District Court for the Eastern District of Texas.

Before BROWN, Chief Judge, and WISDOM, GEWIN, BELL, THORNBERRY, COLEMAN, AINSWORTH, GODBOLD, DYER, SIMPSON, MORGAN, CLARK, RONEY and GEE, Circuit Judges.*

THORNBERRY, Circuit Judge:

Mobil Oil Corporation Marine Transportation Department, Gulf-East Coast Operations [Company] and the Oil,

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* Judge Goldberg did not participate in the consideration of this case.

Chemical and Atomic Workers International Union AFL-CIO and Maritime Local No. 8-801 of that Union [Union] entered into a collective bargaining agreement containing an agency shop clause. Shortly thereafter the company brought suit in federal district court for a declaratory judgment under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), (c), and 28 U.S.C. § 2201, hoping that the court would find the clause violative of the Texas right to work law and thus void and unenforceable.

After a full evidentiary hearing, the district court concluded that the Texas law did apply to this employment relationship and did render the agency shop provision invalid. On appeal, a panel of this court held that a justiciable controversy existed, that jurisdiction properly vested in the district court, and that there was no abuse of discretion by that court in declining to defer to the NLRB. But on the substantive issue the panel concluded that the district court had erred and that the agency shop clause is valid and enforceable with respect to all employees covered by the collective bargaining agreement. The panel held that the Texas right to work law does not apply to this employment relationship because these employees are not employees of Texas or of any other state, but are rather seamen whose job site is on the high seas. Because of the exceptional importance[1] and the unique nature of the question presented, we granted rehearing

1. Five of the six states within the circuit have enacted right to work laws. Fla. Const. art. I, § 6; Ala. Code tit. 26, § 375 (1958); Ga. Code Ann. §§ 54-901 to 54-909 (1961); Miss. Code Ann. § 71-1-47 (1972); Vernon's Tex. Rev. Civ. Stat. Ann. art. 5154a, § 8a, art. 5154g, § 1, art. 5207a, § 2 (1971). All six states have coastal areas along which a large number of maritime workers are employed. 11 Hou. L. Rev. 709, 715 (1974).

en banc to consider the question of the applicability of the Texas right to work law.[2]

I.

The parties to this suit, the district court, and the original panel approached the issue presented by analyzing this employment relationship in terms of its contacts with the state of Texas and other jurisdictions. It is conceded by all that employer/employee contacts with the state of Texas far outweigh contacts with any other *state*, and the evidence supporting that conclusion is neither conflicting nor ambiguous.

The company operates eight oceangoing tankers which move principally between the state of Texas and the state of New York along the East and Gulf Coasts. Since 1962, the headquarters of the company has been located in Beaumont, Texas. All personnel and payroll records are maintained there; all payroll checks are written and mailed from the Beaumont offices; all state and federal taxes are deducted from the seamen's wages in Beaumont; all monthly checkoffs of Union dues for all seamen is performed in Texas; and all grievances filed on the approved grievance forms by the seamen are submitted to and considered by the company's manager at his office in Beaumont, pursuant to the collective bargaining agreement. The state of Texas is the only state administering unemployment compensation for the company's seamen.

The company employs 289 unlicensed seamen; 123 of the 289 have reported Texas as their state of residence;

2. We affirm the panel's threshold determinations of justiciability and jurisdiction for the reasons expressed in the panel opinion. *See* 5th Cir., 483 F.2d 603.

and 152 of the 289 have requested the company to list Beaumont as their shipping port. All actual hiring of seamen occurs in Texas. While approximately 40% of the seamen first make application in New York and 60% make application in Beaumont, the final hiring decision is made only in Beaumont. As many as 60% of the applicants actually come from the Texas labor force. Furthermore, all terminations of seamen are finalized in Beaumont as a result of decisions made at the Beaumont headquarters. The evidence suggests that from the seaman's first encounter with the company to his last, the Beaumont headquarters is constantly in the picture.

The above contacts demonstrate that the state of Texas is intimately involved with this employment relationship. And the district court was clearly correct in its finding that a more substantial part of the administration and performance of the collective bargaining agreement occurs in Texas than in any other state.[3] We think it not insignificant to note that this "justiciable controversy" arose in Beaumont, for it was in the context of the hiring process there that the Union and the company began this battle.[4]

3. The only other state which arguably has any interest in this employment relationship is New York. Of the company's seamen, 60 have reported New York as their state of residence. The collective bargaining agreement was first negotiated and executed there. That agreement was prepared in final form and re-executed in Texas. The agreement does not contain a choice-of-law provision. On this record, it is undisputed that Texas has quantitatively and qualitatively greater contacts with this employment relationship than does any other state, including New York.

4. The company dealt the first blow by notifying all new seamen that it would not enforce the agency shop provision. The union response was sharp: "As far as this Union is concerned, any employee in our Division of Mobil must either join our Union or pay dues to the Union. We intend to exercise our right to have the employment of any unlicensed seaman terminated who does not join or pay dues to the Union.

The panel, however, believed that the predominance of Texas contacts with this employment relationship was not decisive. Instead, the panel concluded that the determinative factor in deciding whether the Texas law is applicable is job situs. The record indicates that the seamen spend 80% to 90% of their working time on the high seas. Each seaman works roughly a 120 day cycle consisting of 90 days aboard ship and 30 days ashore "on vacation" during which shore time he continues to be an employee of the company and to receive wages. The panel's theory is that, with so much of a seaman's working time reserved for the high seas, the Texas law, and for that matter the law of any state, is rendered inapplicable. The panel does not explain, however, why job situs is the singularly most significant, indeed the decisive, factor.[5]

[1] Rather than adopt the panel's limited approach, we choose to weigh all of the contacts in the context of our national labor policy. We disagree with the panel's conclusion that job situs has some talismanic quality. We would agree with the panel opinion that the district court's finding that a more substantial part of the adminis-

5. Two 1949 NLRB decisions furnish the focus of the panel's argument. In Western Electric Co., Inc., 84 NLRB No. 111, and Northland Greyhound Lines, Inc., 80 NLRB No. 60, the Board was called upon to determine appropriate bargaining units for employees who performed their work in many states, some of which prohibited union security agreements. The Board recommended separate units which would be subject to the laws of the respective states according to the employee's job situs. The issue raised in those cases, however, was not whether some state law applied to the employment relationship but *which* state law applied, thus aborting the question with which we are now faced. As the panel noted, neither the Board nor the court has ever been faced with the precise issue now before us. *See* Seafarers International Union of North America, Atlantic, Gulf, Lakes & Inland Waters District et al., 202 NLRB No. 91; Mobil Oil Corp. v. Oil, Chemical and Atomic Workers Int. U., 5th Cir. 1973, 483 F.2d 603, 608.

tration and performance of the collective bargaining agreement occurs in Texas than in any other state is not decisive. The number of contacts is a highly relevant consideration, but the true importance of these contacts is to be understood not in a quantitative vacuum but in the qualitative background furnished by the Congress.

Whether the agency shop clause in this collective bargaining agreement is valid or not depends entirely upon whether the Texas right to work law applies to this employment relationship.[6] In determining whether the Texas law is applicable, we must decide whether it was the intent of Congress in writing section 14(b) to permit a state to apply its right to work law to an employment relationship which has contacts with the state as described by the evidence presented to the district court.

Our task is made more difficult by the fact that there is nothing in the legislative history of the Taft-Hartley Act which expressly answers our question one way or the other. Nevertheless, we must determine as best we can what Congress would have intended on this point had it been presented for their explicit consideration.[7] Our job is not to add up all of the contacts and to decide which jurisdiction has "the most." Our task is to discern whether

6. It is undisputed that the agency shop is a form of union security which is proscribed by the Texas law, and the Texas Attorney General has so ruled. Opinion WW-1018.

7. "The difficulties of so-called interpretation arise when the Legislature has had no meaning at all; when the question which is raised on the statute never occurred to it; when what the judges have to do is, not to determine what the Legislature did mean on a point which was present to its mind, but to guess what it would have intended on a point not present to its mind, if the point had been present." John Chipman Gray, Nature and Sources of the Law: Statutes, p. 173 (1921 ed.)

application of the Texas right to work law would be in furtherance of the Taft-Hartley Act's expressed purposes.[8] *See* National Woodwork Mfrs. Ass'n. v. NLRB, 1967, 386 U.S. 612, 87 S.Ct. 1250, 18 L.Ed.2d 357; Wirtz v. Local 153, Glass Bottle Blowers Ass'n, 1968, 389 U.S. 463, 468, 88 S.Ct. 643, 646, 19 L.Ed.2d 705; NLRB v. Metallic Bldg. Co., 5th Cir. 1953, 204 F.2d 826, 828. And in arriving at a just, proper, and congressionally authorized conclusion, we invoke the eclectic approach of Chief Justice Marshall:

> Where the mind labors to discover the design of the legislature, it seizes everything from which aid can be derived . . .

United States v. Fisher, 1805, 2 Cranch (6 U.S.) 358, 386, 2 L.Ed. 304, 313; *see also* United States v. Dickerson, 1940, 310 U.S. 554, 562, 60 S.Ct. 1034, 1038, 84 L.Ed. 1356.

[2] Having done so, we conclude that it was not the intent of the Congress to prevent Texas from applying its right to work law in the context of this employment relationship. Indeed, in our judgment, application of the Texas law would be in furtherance of our national labor policies. For the reasons expressed below, we hold that the federal labor legislation, the predominance of Texas contacts over any other jurisdiction, and the significant interest which Texas has in applying its right to work law

8. "[I]t is one of the surest indexes of a mature and developed jurisprudence . . . to remember that statutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning." Judge Learned Hand, in Cabell v. Markham, 2nd Cir. 1945, 148 F.2d 737, 739, aff'd, 326 U.S. 404, 66 S.Ct. 193, 90 L.Ed. 165; *See also* Federal Deposit Ins. Corp. v. Tremaine, 2nd Cir. 1943, 133 F.2d 827, 830.

to this employment relationship warrant application of the Texas law and, consequently, invalidation of the agency shop provision.

II.

We begin with "the language of the statute itself." Jones v. Alfred H. Mayer Co., 1968, 392 U.S. 409, 420, 88 S.Ct. 2186, 2193, 20 L.Ed.2d 1189. Sections 7 and 8(a)(3) of the Labor Management Relations Act, 29 U.S.C. §§ 157, 158(a)(3), specifically authorize employers and labor organizations to enter into union shop agreements by whose terms membership in a union after a short waiting period, is required as a condition of employment.[9] The Supreme Court has interpreted these sections to authorize an agency shop, a form of union security conditioning employment on the payment of

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9. 29 U.S.C. § 157:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."

29 U.S.C. § 158:

"(a) It shall be an unfair labor practice for an employer—

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later . . ."

regular union dues and initiation fees in lieu of actual union membership. NLRB v. General Motors Corp., 1963, 373 U.S. 734, 738-739, 83 S.Ct. 1453, 10 L.Ed. 2d 670; Retail Clerk's Inter. Ass'n v. Schermerhorn [*Schermerhorn I*], 1963, 373 U.S. 746, 751, 83 S.Ct. 1461, 1464, 10 L.Ed.2d 678.

In the same stroke, section 8(a)(3) was redrafted to prohibit the closed shop which its predecessor section, section 8(3) of the National Labor Relations Act, had permitted. H.R. Conf. Rep. No. 510, 80th Cong., 1st Sess. 60, 1 Leg. Hist. L.M.R.A. 545, U.S. Code Cong. Serv. 1947, p. 1135. The closed shop differs from the union shop in only one regard: the closed shop requires that the job applicant be a member of the union before he is hired 11 Hou. L. Rev. 709, 710 n. 7 (1974).

Section 14(b) of the Act, 29 U.S.C. § 164(b), provides:

> Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

By enacting this provision, Congress desired to "make certain" that section 8(a)(3) of the Act could not "be said to authorize arrangements of this sort [compulsory unionism] in States where such arrangements were contrary to the State policy." H.R. Conf. Rep. No. 510, supra, 1 Leg. Hist. L.M.R.A. at 564; *Schermerhorn I*, supra; U.S. Code Cong. Serv. 80th Cong., 1st Sess. 1947, p. 1135. The language of section 14(b) as well as its legislative history suggests an intent on the part of the Congress

to save to the states the right to prohibit the practical equivalents of compulsory unionism, including the agency shop. *Schermerhorn I*, supra; Retail Clerks Inter. Ass'n v. Schermerhorn, 1963, 375 U.S. 96, 98, 84 S.Ct. 219, 220, 11 L.Ed.2d 179 [*Schermerhorn II*]; NLRB v. Houston Chap., Asso. Gen. Con. of America, Inc., 5th Cir. 1965, 349 F.2d 449, 453.

The national labor policy expressed in these sections of the Taft-Hartley Act is one which directly authorizes union shop arrangements, but only in those states which have not passed the right to work laws. In a sense, a conflict between state and federal law may thereby arise

> but it is a conflict sanctioned by Congress with directions to give the right of way to state laws barring the execution and enforcement of union-security agreements . . .

Schermerhorn II, supra, 375 U.S. at 103, 84 S.Ct. at 222, 11 L.Ed.2d at 184. In essence, the congressional judgment is that state right to work laws are in harmony with, and part of, the national labor policy.

The district court focused its attention on the "application" of the agency shop clause requiring the payment of dues and fees "as a condition of employment in" Texas. Believing that the collective bargaining agreement received its most significant application in Texas, the district court concluded that the Texas law applied. The panel, however, began with the premise that state right to work laws are applicable only to employees of those particular states and concluded that the employees in this case are not for the purpose of their collective bargaining agreement employees of Texas or any other state because

of their job situs. Fortunately, Congress has given us some indication of the approach it would favor.

When the Congress prohibited the closed shop while permitting the union shop in the Taft-Hartley Act, the Congress was demonstrating its concern with the process by which men and women were hired. As conceived by that legislative body the closed shop enabled union hiring halls to control absolutely the pool of labor available to an employer. H.R. Rep. No. 245, 80th Cong., 1st Sess., 1 Leg. Hist. L.M.R.A. 295, 300. The hiring decision was, in effect, made by the union hiring hall, for the employer never saw a job applicant unless the applicant had been referred by the union, and of course, only union members were referred. The Congress singled out the maritime industry as a serious problem area.[10] The legislative history of the Act exhibits an express intent to give to the employer some measure of freedom in the hiring process. *See* H.R. Rep. No. 245, supra; *see also, e. g.*, 93 Cong. Rec. A1297 (1947) (remarks of Representative Gerald Landis) and 93 Cong. Rec. A2011 (1947) (remarks of Representative Hugh Meade), infra at note 11. The

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10. ". . . It is clear that the closed shop which requires pre-existing union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated. In the maritime industry and to a large extent in the construction industry union hiring halls now provide the only method of securing employment. This not only permits unions holding such monopolies over jobs to exact excessive fees but it deprives management of any real choice of the men it hires. Extension of this principle to licensed deck and engine officers has created the greatest problems in connection with the safety of American vessels at sea. . . .

"Under the amendments which the committee recommends, employers would still be permitted to enter into agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired . . ." S. Rep. No. 105, 80th Cong., 1st Sess., 1 Leg. Hist. 412-413.

union shop agreement permits an employer to hire a person who has not, at or before the moment of hiring, joined the union. With the proscription of the closed shop, union hiring halls are now required to refer job applicants on a nondiscriminatory basis, so that an employer may consider nonunion applicants on an equal basis with union applicants. NLRB v. Houston Chap., Asso. Gen. Con. of America, Inc., supra. In sort, if the congressional discussion on compulsory unionism could be said to have any single reference point, it is not job situs but the hiring process.[11] And in our judgment, the language of

11. ". . . For the last 14 years, as a result of labor laws ill-conceived and disastrously executed, the American workingman has been deprived of his dignity as an individual. He has been cajoled, coerced, intimidated, and on many occasions beaten up, in the name of the splendid aims set forth in section 1 of the National Labor Relations Act. His whole economic life has been subject to the complete domination and control of unregulated monopolists. He has on many occasions had to pay them tribute to get a job. He has been forced into labor organizations against his will . . . He has been denied any voice in arranging the terms of his own employment. . . ." H.R. Rep. No. 245, supra, 1 Leg. Hist. L.M.R.A. 295.

". . . The bill bans the closed shop. Under carefully drawn regulations it permits an employer and a union voluntarily to enter into an agreement requiring employees to become and remain members of the union a month or more after the employer hires them or after the agreement is signed . . . Under this clause employers may select their own employees . . ." *Id.*, at 300.

". . . *Section 8(a)(3).*—In the language of the present act, this section forbids employers to discriminate in regard to the hire and tenure of employees or any term or condition of employment to encourage or discourage membership in any labor organization. Consistently with court decisions, the bill expressly makes this clause applicable to persons seeking employment, thereby banning 'black lists.' " *Id.*, at 321.

"Section 8(a)(3): The proviso to this section has been redrafted to abolish what is narrowly termed the 'closed shop.' An employer is permitted to make agreements requiring membership in a union as a condition of employment applicable to employees in a given bargaining unit 30 days after an employee is hired. . . " S. Rep. No. 105, 80th Cong., 1st Sess., 1 Leg. Hist. 426.

section 14(b) which looks to the "execution or application" of agreements requiring membership as a condition of employment refutes the notion that Congress was suddenly singularly concerned with the job situs of the employee rather than with the effects of such an agreement on men and women seeking employment in a mobile society.[12] The language and history of section 14(b)

"I prefer the union shop to the closed shop because the employer is free to hire nonunion workers and is the sole judge of the qualifications of the applicants. Union membership may be acquired immediately following employment or within a stipulated period thereafter . . ." 93 Cong. Rec. A1297 (1947) (remarks of Representative Gerald Landis).

"The closed shop would be outlawed.

"But a union shop would be authorized under certain circumstances. Under the union shop, an employer may hire anyone of his choosing, but that person must become a member of the shop union within a given period, usually 30 days . . .

"Under this provision an employer may select his own employees and the employee has 30 days to decide whether he or she cares to join the union . . ." 93 Cong. Rec. A2011 (1947) (remarks of Representative Hugh Meade).

See also Cox, The Labor Management Relations Act, 61 Harv. L. Rev. 274, 297 (1948).

12. H.R. 3020, as it passed the House, permitted union shop agreements "if such provisions are not in conflict with the law of any State in which the agreement is to be carried out . . ." *See* 1 Leg. Hist. L.M.R.A. 183-84. The original House version of the provision which found its final form in § 14(b) was unclear as to the scope of a state's power over union security agreements. *See* 1 Leg. Hist. L.M.R.A. 207-08. The House Committee Report on H.R. 3020, however, interpreted the provision as authorizing union shop agreements "only if they are valid under the laws of any State in which they are to be performed."

During the debate on the House version of the bill, passing reference was made to the McCarren Act, 15 U.S.C. § 1011 et seq., in which Congress declared that the activities of insurance companies were subject to state regulation, notwithstanding the interstate and even international character of the insurance business. *See* 93 Cong. Rec. 3621 (1947) (remarks of Representative Case). While the legislative history of the McCarran Act suggests an intent to limit the extraterritorial application of state laws, there is nothing to that effect in the legislative history of the Taft-Hartley Act. Moreover,

suggest that a state may apply its right to work law whenever the state has a significant interest in the process by which a union security agreement is applied. No one disputes the fact that this agency shop agreement receives its application in Beaumont, Texas. Indeed, it is the company's resolute refusal to apply the agreement in Beaumont, Texas, that has caused this suit.

The preamble to the Texas right to work law records the legislative judgment that because unions exercise great influence over the economic well-being and freedom of the Texas labor force, the state has an important interest in removing union coercion from the hiring process.[13]

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the McCarran Act has been interpreted to permit regulation by the state in which the insurance practice has its "impact" or "operative force." *See, e.g.*, FTC v. Travelers Health Ass'n, 1960, 362 U.S. 293, 301, 80 S.Ct. 717, 722, 4 L.Ed.2d 724; United States v. Chicago Title and Trust Co., N.D. Ill. 1965, 242 F.Supp. 56, 66; *see also* American Hospital and Life Ins. Co. v. FTC, 5th Cir. 1957, 243 F.2d 719, 724, aff'd, 1958, 357 U.S. 560, 78 S.Ct. 1260, 2 L.Ed.2d 1540; State Bd. of Insurance v. Todd Shipyards Corp., 1962, 370 U.S. 451, 82 S.Ct. 1380, 8 L.Ed.2d 620; Prudential Ins. Co. v. Benjamin, 1946, 328 U.S. 408, 66 S.Ct. 1142, 90 L.Ed. 1342. And the Supreme Court has permitted state regulation of maritime insurance contracts which clearly have an extraterritorial effect. Wilburn Boat Co. v. Fireman's Fund Insurance Co., 1955, 348 U.S. 310, 75 S.Ct. 368, 99 L.Ed. 337; Toomer v. Southwest Casualty Insurance Co., S.D. Tex. 1964, 231 F.Supp. 542, 543; Irwin v. Eagle Star Insurance Co., 5th Cir. 1972, 455 F.2d 827, 829-830.

13. Vernon's Ann. Civ. Stat. art. 5154a, § 1, provides in part:
"Because of the activities of labor unions affecting the economic conditions of the country and the State, entering as they do into practically every business and industrial enterprise, it is the sense of the Legislature that such organizations affect the public interest and are charged with a public use. The working man, unionist and non-unionist, must be protected. The right to work is the right to live." *See* Lunsford v. City of Bryan, 1957, 156 Tex. 520, 297 S.W.2d 115; Texas Federation of Labor v. Brown & Root, Inc., 246 S.W.2d 938 (Tex. Civ. App.—1952, writ ref'd n.r.e.); Sheet Metal Workers Local No. 175 v. Walker, 236 S.W.2d 683 (Tex. Civ. App.—1952, writ ref'd).

Each of the Texas right to work provisions expresses a concern with that process. Article 5207a, § 2, provides: "No person shall be denied employment on account of membership or nonmembership in a labor union." Article 5154a, § 8a provides: "It shall be unlawful for any labor union, . . . to collect . . . any fee . . . whatsoever, as a work permit or as a condition for the privilege to work from any person not a member of the union. . . ." And, lastly, Article 5154g, § 1, provides that ". . . the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union." Again, if any single legislative focus can be discerned from the Texas provisions, it is not job situs or the place of job performance but the hiring process. Thus one triggering point for the application of these provisions is hiring within the state. As indicated earlier, this is consistent with the language and intent of section 14(b).

If, as we have noted, the Texas laws were enacted to afford the Texas labor force protection from compulsory unionism, the fact that as many as 60% of the job applicants come from the Texas labor force gives Texas good reason for applying its right to work provisions. But the state's interest goes far beyond its predominant association with the hiring process and its numerous other contacts with this employment relationship which have already been listed. During the one-fourth of the year when the employees are "on vacation" in Texas, they presumably have homes and families; they pay taxes; they send their children to school; they eat, sleep, and move about; they act like other citizens of the state. In short, they are precisely the people whom the Texas law was designed to protect.

The high seas definitely have contact with the employees, but what is the interest of the high seas in preventing application of the Texas law? How is some important non-Texas, national, or international policy furthered by refusing to apply the Texas law? The fact that maritime work is interstate, or even international, in character does not imply that the Texas law is inapplicable since federal regulation in these matters is predicated upon interstate commerce. No one who studies the legislative history of section 14(b) can seriously argue that Congress intended to permit the states to prohibit compulsory unionism only in those instances where interstate commerce was not affected.[14] Consequently, there is no uniformity principle at stake here since a national or international union may have a union shop in one state and find that arrangement prohibited in another by the state law.[15]

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14. ". . . [B]y section [14(b)] the United States expressly declares the subject of compulsory unionism one that the State may regulate . . . notwithstanding that the agreements affect commerce . . ." H.R. Rep. No. 245, 80th Cong., 1st Sess., 1 Leg. Hist. L.M.R.A. 325.

"My understanding is that the basis of this legislation, constitutionally speaking, is the commerce clause of the Constitution, authorizing the Federal Government to regulate commerce between the states. Throughout the entire history of such legislation that has been its basis.

"This measure does not affect wholly intrastate commerce and persons who are engaged in intrastate commerce, rather than interstate commerce. The provision of the measure which exempts any State from the operation of its provisions, if such State has outlawed the closed shop, therefore in effect adopts the State as the agency through which the regulation of interstate commerce shall take place, insofar as the closed shop is regulated." 93 Cong. Rec. 6679 (1947) (remarks of Senator Barkley); *see also* 93 Cong. Rec. 6614 (1947) (remarks of Senator Morse) and 93 Cong. Rec. 3621-22 (1947) (remarks of Representatives Barden, Hoffman, Jennings, and Case).

15. "By making the matter one of state law, Congress has not only authorized multiformity on the subject, but practically guaranteed it." Amalgamated Ass'n of St., E.R. & M.C. Emp. v. Lockridge, 1971, 403 U.S. 274, 317, 91 S.Ct. 1909, 1933, 29 L.Ed.2d 473, 500 (Mr. Justice White, dissenting).

". . . [I]n one important area the bill expressly abandons the principle of uniform application of national policy under Federal law. The bill's stated policy of preserving some degree of union security would be abdicated in all States where more restrictive policies exist. In other respects the bill makes clear that Federal policy would govern insofar as activities affecting commerce are concerned. This is not only an invitation to the States to distort national policy as they see fit, but is a complete forsaking of a long-standing constitutional principle." President Truman's Veto Message, 93 Cong. Rec. 7500 (1947).

The panel opinion suggested that allowing Texas to apply its right to work law here would allow an employer to make an "arbitrary choice," could produce "bizarre consequences," and could defeat the purposes of sections 7, 8, or 14(b) of the Act. On the contrary, as the legislative history indicates, allowing Texas to apply its laws here is in furtherance of the national labor policy expressed in the Act and in furtherance of the Texas legislative judgment. Furthermore, the panel's fear that employers might choose headquarter locations in states with right to work laws and thereby defeat national labor policy is, on this record, unfounded. First, the employer's headquarters is not the decisive factor, any more than job situs is. To reiterate, we have chosen to weigh all of the employer and employee contacts in the context of our national labor policy. Secondly, the Union has never even alleged that Mobil moved to Texas in order to seek the shelter of the Texas right to work law. We will have time enough to consider that factor in the proper case. We should note, however, that employers may set up their operations anywhere they choose, incurring the reponsibilities and gaining the advantages of that locale as they do so. The Union has directed us to no language in

section 14(b) or its legislative history which suggests that a company cannot freely choose to establish a substantive enterprise in a right to work state for the purpose of obtaining the benefit of the state's law.

It is the antithesis of the method we use here to permit an employer to make a truly arbitrary choice of the state law to be applied. The applicability of a state right to work law will depend upon whether such application would further the policies and purposes of our national labor laws. For example, where an employer has artificially constructed its operations or its hiring process in such a way that the substance of its activities occurs in and the greatest part of its labor force comes from a non-right to work jurisdiction while a pro forma final hiring decision is made in a right to work state, application of the state's right to work law would be contrary to the national labor policy. We are not faced with that circumstance here.

Moreover, we see no bizarre consequences flowing from the method used or the result reached today. Yet refusing to allow Texas to apply its law here would create the bizarre consequence of exempting the maritime industry from the operation of section 14(b). We have found nothing in the legislative history or the language of any present labor legislation, and the Union has directed us to none, which suggests an intent on the part of the Congress to create a special rule for maritime workers. On the contrary, the legislative history of the Taft-Hartley Act indicates that Congress was aware of the problems in the maritime industry caused by compulsory unionism and sought to deal with them. See S. Rep. No. 105, 80th Cong., 1st Sess., 1 Leg.Hist. 412-413; footnote 9, supra.

In the past, when Congress has decided to supersede section 14(b) and state right to work laws, it has done so expressly. Prior to 1951, the Railway Labor Act, 45 U.S.C. § 151 et seq., prohibited union shop agreements. But in 1951, Congress amended the Act to permit carriers covered by the law and their employees to enter into union shop agreements

> [n]otwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, *or of any State*.

45 U.S.C. § 152, subd. 11 (emphasis added). Fully aware of the Taft-Hartley Act and its section 14(b), Congress used express language in the 1951 amendment precisely to defeat application of state right to work laws. Railway Employees' Dept. v. Hanson, 1956, 351 U.S. 225, 232, 76 S.Ct. 714, 718, 100 L.Ed. 1112; *see also* Sams v. Brotherhood of Railway and Steamship Clerks, 4th Cir. 1956, 233 F.2d 263, 264; Inter. Ass'n of Machinists v. Sandsberry, Tex. Civ. App. 1954, 277 S.W.2d 776, 780-781, aff'd, 1956, 156 Tex. 340, 295 S.W.2d 412, cert. denied, 1957, 353 U.S. 918, 77 S.Ct. 669, 1 L.Ed.2d 665. In our judgment, this instance of congressional action demonstrates that state right to work laws are not to be ignored unless the language or legislative history of the federal law permits such a course.[16] Railway Employees' Dept. v. Hanson, supra. State prohibition of compulsory unionism is a "congressional dispensation of grace, not the imperious right of a state," and thus Congress has always had the power to exempt seamen from

16. For the history of the Railway Labor Act and the 1951 amendment, *see* Inter. Ass'n of Machinists v. Street, 1961, 367 U.S. 740, 81 S.Ct. 1784, 6 L.Ed.2d 1141; Railway Employees' Dept. v. Hanson, supra.

the operation of state right to work laws. Sea PAK v. Industrial, Technical & Pro. Emp., Natl. Martime Union, S.D. Ga. 1969, 300 F. Supp. 1197, 1201, aff'd, 5th Cir. 1970, 423 F.2d 1229, aff'd, 1971, 400 U.S. 985, 91 S.Ct. 452, 27 L.Ed2d 434; Railway Employees' Dept. v. Hanson, supra. But it has chosen not to do so.

If we were to carve out an exception for seamen here, in the absence of any suggestion to do so from Congress, we would be encroaching on the legislative authority. That course of action, in spite of Justice Cardozo's frank observation that judge-made law is "one of the existing realities of life," is beyond our constitutional prerogatives. *See* Cardozo, The Nature of the Judicial Process (1921 ed.), p. 10.

III.

[3] Alternatively, the Union contends that it is improper to strike out the agency shop clause in its entirety from the collective bargaining contract since some of the seamen have greater contacts with states other than Texas, states without right to work laws. The Union asks that we fashion a rule which renders the Texas right to work law inapplicable to those employees who have greater contacts with non-right to work states than with Texas. We decline the Union's invitation for two reasons.

The agency shop clause in the collective bargaining contract states:

> For the duration of the Agreement all employees hired shall, as a condition of employment, become members of the Union and/or in the alternative pay the regular union dues and initiation fees within 31 days from the employment date.

This clause unambiguously demands that all employees hired join the union or pay the required fees. The clause makes no distinction between job applicants who are to be protected by the Texas law and those who are not. As the panel majority noted, we cannot rewrite the contract to reflect these allegedly distinguishable classes.[17]

Secondly, even if we could rewrite the contract, on this record we are unwilling to hold that there is an identifiable group of employees who are not subject to the Texas law. The Union's brief admits that "the record before the court was insufficient to enable the court" to authorize partial application of the agency shop provision. Since we are not the fact-finders in the judicial process, we have no basis for implementing the Union's alternative request.

IV.

We have attempted a multi-dimensional analysis of the question presented for our disposition. On one level we have examined this employment relationship in terms of its contacts with the state of Texas and other jurisdictions. On another we have studied Congress' actions in passing the Taft-Hartley Act and the 1951 amendment to the Railway Labor Act in order to give meaning and context to the undisputed contacts. On still a third level we have scrutinized the interests of different jurisdictions in applying their laws to this employment relationship.

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17. *See* Perry Coal Co. v. NLRB, 7th Cir. 1961, 284 F.2d 910, 914; Lewis v. Quality Coal Corp., 7th Cir. 1959, 270 F.2d 140, 142; Fentress Coal & Coke Co. v. Lewis, 6th Cir. 1959, 264 F.2d 134, 135-136; NLRB v. News Syndicate Co., Inc., 2nd Cir. 1960, 279 F.2d 323, 328.

The resulting matrix offers a clear picture. Texas is intimately involved with this employment relationship. Texas has a more significant interest in applying its law than does any other jurisdiction. And the federal labor legislation suggests a congressional intent to allow Texas to apply its law, rather than to exempt the maritime industry from the operation of section 14(b). Having exhausted, as best we can, the reality before us, we are faced with but one result.

The judgment of the district court is affirmed.

AINSWORTH, Circuit Judge, with whom BROWN, Chief Judge, and DYER, SIMPSON, MORGAN and RONEY, Circuit Judges, join, (dissenting).

The question for decision is important and of first impression: Whether Texas' right-to-work statutes are applicable to the agency shop clause in a collective bargaining agreement involving mobile maritime employees—in this case, seamen employed on vessels operating on the high seas, whose work is performed entirely outside the State of Texas.[1]

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1. The highly controversial nature of so-called right-to-work laws is well known. No subject of labor relationship between employers and unions causes greater bitterness. Without attempting here to take sides on this troublesome issue, a few of the pros and cons will serve to demonstrate the heat which is engendered when the subject of such laws is raised.
For example, the "free rider" issue is hotly disputed:

> The unions claim that the worker who refuses to join the union is a free rider, since the union is obliged by law to bargain for the entire work force. The nonmember gets all the benefits of union representation without paying dues. Management retorts that the nonunion member under a right-to-work law is not a free rider, but a forced rider, since the union demands that it bargain for the entire work force. The union, in turn, maintains

The majority concedes that neither the National Labor Relations Board nor the Court has ever been faced with the precise issue before us and that nothing in the legislative history of the Taft-Hartley Act expressly answers

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> that the law must provide, as it does, for the union to represent all workers, union and nonunion, for if each worker were able to bargain individually, the employer could discriminate against the union by maintaining two wage scales—one for the union and a higher one for nonunion workers. Under this arrangement it would not be long before the union would be mustered out of the plant.
>
> Once again, the important consideration is not whether the nonunion worker is a free rider or a forced rider, but what the workers believe the case to be. When nonunion employees work side by side with union employees there is bound to be friction if the union workers believe the nonunion workers are free riders. This friction runs counter to the aim of our national labor policy, which places industrial stability as its prime objective.

Marshal, "Right-to-Work," Pro and Con, 17 Lab. L.J. 131, 136-137 (1966). As to more general aspects of the controversy, *see also* Dempsey, The Right-to-Work Controversy, 16 Lab. L.J. 387, 388 (1965), as follows:

> An analysis of the campaigns to pass right-to-work laws usually shows that there is a vast difference of viewpoint on the interpretation of the meaning of these laws between opponents and proponents of the laws. Before the public, the advocates of the right-to-work laws take what might be called a contractual viewpoint. They aim to prevent a clause in the labor management contract which would make membership in a union a condition of employment. In their minds, the issue is as simple as that. To make a man become a union member or forfeit his job or right to work is regarded as unAmerican and dictatorial. In fact, according to this view, unions would be stronger the more voluntary they were.
>
> The opponents of the right-to-work laws marshall their arguments based not on the contractual approach but on what might be called the integral viewpoint of the law. According to the union, collective bargaining, unionism and union security (closed shop or union shop) are a unity. An attack on one is an attack on all. Moreover, union security usually involves at least three additional activities: organization, collection of dues and some form of job control. The union in its campaign to stop these laws usually claimed that their true purpose was to restrict some or all of these activities.

our question. It also concedes that the district court's finding that a more substantial part of the administration and performance of the collective bargaining agreement occurs in Texas than in any other state is not decisive and that the number of Texas contacts, while relevant, is likewise not determinative. It proceeds nevertheless to "weight all of the [Texas] contacts in the context of our national labor policy" and devotes the greater part of its opinion to an academic dissertation on our national labor policy, congressional intent and the benefits foreseen by Congress in banning the closed shop, thereby allowing a greater measure of freedom to both employee and employer in the hiring process. The treatise, though interesting, is not relevant to the issues here.

There is no dispute about what Congress did when it enacted the Taft-Hartley Act and included therein section 14(b) which authorizes a state, at its option, to enact so-called right-to-work laws. Pursuant to this provision, Texas passed such laws. The question to be determined is not the validity of such legislative enactments, but whether they are applicable to the collective bargaining agreement in this case. Unfortunately, by focusing on uncertain legislative history rather than on the precise issue of whether federal or state law should apply to the employment contracts of maritime workers performing no work in any state,[2] the majority finesses the issue and ignores the impact of the central dispute in this case.

2. The evidence shows that the collective bargaining agreement was negotiated and executed in New York; that since 1942 labor contracts for the employee unit involved here have been negotiated in New York and that present negotiations for a successor contract have been occurring in New York. Mobil's corporate headquarters remain in New York, and prior to 1962 its Marine Transportation Department was likewise headquartered there. Information extracted from vessel logs shows that of the eight tankers operated by the company, five of them making typical trips touching the port of Beaumont for a period of time in May and June 1972 were in that port only 5.5% of the total time. A sixth vessel did not touch the Texas port during that period of time and part of July 1972. Many of the trips bypass Texas completely. For example, eight times a year a vessel travels from the East Coast to Puerto Rico and returns. At the time of the trial one of the vessels was en route to Guam on a 6-month charter, and had not been in a Texas port for 50 days. All of the vessels are located on the high seas or in non-Texas ports 80% to 90% of the time. 57% of the seamen are residents of states other than Texas.

It is undisputed that the combined effect of sections 7 and 8(a)(3) of the Labor Management Relations Act, as interpreted by the Supreme Court,[3] and section 14(b) of the Taft-Hartley Act is to recognize the validity of an agency shop except in those states which prohibit them. The majority points out that Congress in passing section 14(b) carved out no exception for seamen. What the majority fails to discern, however, is that seamen have traditionally maintained an exceptional status in regard to the regulation and control of their employment, and that section 14(b) cannot reasonably be construed to remove them from that category. Seamen, particularly the type of blue-water seamen involved here, as wards of admiralty have been accorded a special status and protection under federal maritime law unknown to state law in the domain of the master-servant relationship.[4]

3. NLRB v. General Motors Corp., 373 U.S. 734, 83 S.Ct. 1453, 10 L.Ed.2d 670 (1963); Retail Clerk's Inter. Ass'n v. Schermerhorn, 373 U.S. 746, 83 S.Ct. 1461, 10 L.Ed.2d 678 (1963).

4. *See, e.g.*, Garrett v. Moore-McCormack, 317 U.S. 239, 246-248, 63 S.Ct. 246, 251-252, 87 L.Ed. 239 (1942); Socony-Vacuum Co. v. Smith, 305 U.S. 424, 430-431, 59 S.Ct. 262, 266, 83 L.Ed. 265 (1939); The Arizona v. Anelich, 298 U.S. 110, 122-123, 56 S.Ct. 707, 711-712, 80 L.Ed. 1075 (1936); Warner v. Goltra, 293 U.S. 155, 162, 55 S.Ct. 46, 49, 79 L.Ed. 254 (1934). Contractual matters have been specially scrutinized in order to protect seamen. "Our national legis-

Unlike the land-based worker, the seaman's employment and all of the rights and restrictions flowing therefrom, are determined by federal statutory and admiralty law, not state law. Hiring, discharge and various terms of employment are regulated by shipping articles mandated by federal statute.[5] Compensation to seamen for illness, injury, disability and death is provided through the unique admiralty doctrine of maintenance and cure,[6] and by special federal statutory enactments such as the Jones

lature and the courts of admiralty have given particular expression to the wardship theory in matters relating to seamen's contracts." Norris, The Seaman as Ward of the Admiralty, 52 Mich. L. Rev. 479, 487 (1954).

5. 46 U.S.C. §§ 563-568.

6. The liberality of the remedy afforded by this ancient doctrine when compared to workmen's compensation acts is shown in the following passage from Norris, The Law of Seamen, Vol. 1, 2nd Ed., § 575:

> A seaman becomes entitled to maintenance and cure by showing that his injury or illness arose while he was in the service of the ship. The injury or illness need not arise out of his employment and the right to the remedy is irrespective of contributory negligence unless due to his own willful misbehaviour. A land worker who seeks an award under most compensation acts must show that the disability was caused by accidental injury or by an occupational disease. Under the general maritime law an illness which manifests itself during the period of employment (although perhaps an aggravation of a preexisting condition, the seriousness of which was not known to the seaman) entitles him to recover the cost of his maintenance and cure until the maximum cure is reached. The illness may be nothing more serious than a simple cold, but if it disables the seaman to an extent that he cannot resume his employment, he is entitled to be paid for his expenditures for medicines, nursing care and the cost of maintaining himself. Moreover, the per diem rate presently allowed to seamen for the cost of maintenance and cure is generally on a more liberal scale than that accorded by compensation. Finally, a seaman is entitled to the cost of his maintenance and cure immediately following the onset of his illness or injury, whereas compensation laws generally include a hiatus prior to the accrual of weekly payments.

Act[7] and the Death on the High Seas Act.[8] Federal maritime law covers the gamut of a seaman's employment relationship, including wages,[9] maritime liens for the collection therefor,[10] the protective procedures against attachment and assignment of wages,[11] the rights accorded seamen to receive at every port half of unpaid wages earned[12] and double payment for wages withheld without sufficient cause,[13] physical qualifications and requirements for seamen,[14] and disciplinary problems.[15] In no employment field is the master-servant relationship so predominantly controlled by federal maritime law than in that existing aboard ship between the master of the vessel and the men who man it. Indeed, it does not appear that there is any aspect of the employment relationship which Texas law may properly control—except, of course, for the novel injection of Texas' right-to-work law into the present labor contract. In practical effect, state regulation of this employer-employee relationship stops at the water's edge.

The majority opinion places much emphasis on the legislative history of the Taft-Hartley Act, concluding that it indicates great concern with the hiring process and a

7. 46 U.S.C.A. § 688.

8. 46 U.S.C. §§ 761-768.

9. 46 U.S.C. §§ 682-685.

10. 46 U.S.C. § 953.

11. 46 U.S.C. § 601.

12. 46 U.S.C. § 597.

13. 46 U.S.C. § 596.

14. 46 U.S.C. § 672.

15. 46 U.S.C. §§ 701-710.

willingness to substitute state law for federal standards where appropriate. Congress was in truth concerned about the adverse impact of compulsory unionism on the hiring process, but section 14(b) was not, as the majority suggests, designed to be the remedy for these ills. Section 14(b) was inserted into the Taft-Hartley Act merely to restate preexisting law, not to expand the jurisdiction of states relative to employment conditions involving maritime workers, traditionally the subject of federal law. The National Labor Relations Act (Wagner Act) itself was not intended to override state laws regulating the closed shop.[16] Congressional amendment of what is now section 8(a)(3) of the Labor Management Relationship Act, 29 U.S.C. § 158(a)(3), not the inclusion of section 14(b), was the chief tool designed to alleviate the perceived evils of compulsory unionism.

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16. In its report on the N.L.R.A., the Senate committee stated that "the bill does nothing to facilitate closed-shop agreements or to make them legal in any State where they may be illegal." S. Rep. No. 573, 74th Cong., 1st Sess. 11 (1935); *see also* H. Rep. No. 1147, 74th Con., 1st Sess. 19-20 (1935); S. Rep. No. 105, 80th Cong., 1st Sess. 6 (1947), 1 Leg. Hist. L.M.R.A. 412. In explaining to Congress the reason for section 14(b)'s inclusion, the conferees for the Taft-Hartley Act stated as follows:

> It was never the intention of the National Labor Relations Act, as is disclosed by the legislative history of that act, to preempt the field in this regard so as to deprive the States of their powers to prevent compulsory unionism. Neither of the so-called "closed shop" proviso in section 8(3) of the existing act nor the union shop and maintenance of membership proviso in section 8(a)(3) of the conference agreement could be said to authorize arrangements of this sort in States where such arrangements were contrary to the State policy. To make certain that there should be no question about this, section 13 was included in the House bill. The conference agreement, in section 14(b), contains a proviso having the same effect.

House Conf. Rep. No. 510, 80th Cong., 1st Sess. 60 (1947), 1 Leg. Hist. L.M.R.A. 564, U.S. Code Cong. Serv. p. 1166. *See also* H. Rep. No. 245, 80th Cong., 1st Sess. 44 (1947), 1 Leg. Hist. L.M.R.A. 335.

A careful reading of the legislative history of the Taft-Hartley Act shows that Congress felt that section 8(a)(3) would curb problems in the hiring process by removing prior union membership as an employment prerequisite and by providing that expulsion from a union would not necessitate discharge from employment so long as initiation fees or dues were not delinquent.[17] Senator Taft noted in debate that a prime example of problems generated by the closed shop was in the West Coast shipping industry.[18] He then outlined the changes that would be made by section 8(a)(3) and, with no reference whatever to section 14(b), concluded that the abuses in the hiring process would thereby be corrected.[19] Congress did indeed single out the maritime industry as a serious problem area, as noted by the majority opinion (*ante*, p .749 & n. 10). The cited provisions of the legislative history, however, make no reference to section 14(b) as a palliative for these problems; rather, the amendments to section 8(a)(3) were deemed fully capable of solving these problems.[20] Since the agency shop provision before us avoids the evils in the hiring process Congress was try-

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17. After reiterating some of the problems of the closed shop, the Senate Report on the Taft-Hartley Act detailed the remedial provisions contained in present section 8(a)(3) and concluded:

> It seems to us that *these amendments* remedy the most serious abuses of compulsory union membership and yet give employers and unions who feel that such agreements promoted stability . . . the right to continue such agreements. (Emphasis added.)

S. Rep. No. 105, 80th Cong., 1st Sess. 7 (1947), 1 Leg. Hist. L.M.R.A. 413.

18. 93 Cong. Rec. 3952 (1947), 2 Leg. Hist. L.M.R.A. 1010.

19. Id. at 3952-3953, 2 Leg. Hist. L.M.R.A. 1010-1011.

20. S. Rep. No. 105, 80th Cong., 1st Sess. 6-7 (1947), 1 Leg. Hist. L.M.R.A. 412-413; see the quotation from this passage in n. 17, *supra*.

ing to correct, and since it is clearly valid under section 8(a)(3), it cannot be validly concluded that enforcement of this provision is contrary to federal labor policy.[21]

The majority opinion bases its holding on (1) the predominance of Texas contacts, (2) federal labor legislation, and (3) the significant interest which Texas has in applying its right-to-work laws. The consistent and traditional control by federal law of every phase of maritime employment relationships and contracts refutes the proposition that Employer's contacts with Texas[22] justifying injection state law into federal maritime affairs. As to federal labor policy, it is clear from the previous discussion that the agency shop provision in question in the present contract is totally consistent with Congress' desire for a fair hiring process. Moreover, whatever Texas' interest may be in applying its law to this contract, the State of Texas has not been sufficiently concerned either to invoke its laws itself or to intervene in these proceedings. Employer is seeking to avoid its own labor contract by vicarious assertion of Texas law. In any case, the admitted premise that the agency shop clause of the labor contract is in contravention of the law of Texas does not permit the conclusion that a clause contained in a

21. In any case the majority opinion does not fully explain how Congress could fairly be said to have intended that a New York employee of Mobil, who resides in a state where his employment contract was entered into and where agency shop provisions are permissible, and who performs no work whatever in Texas, should be prohibited by Texas law from enjoying the benefits of an agency shop provision in his employment contract.

22. The great bulk of the contracts with Texas recited by Employer and the majority are relationships between *Mobil* and Texas. Insofar as the workers are concerned, it is conceded that they perform no work in Texas, and that fewer than half are residents of Texas.

New York contract and affecting employment performed solely outside of the State of Texas is invalid.

The result which the majority reaches in this case is somewhat impractical. The attempt of the Court, at the behest of Mobil Oil Company, to give extraterritorial effect to Texas' right-to-work laws fails both in soundness and in logic. Here the majority has taken an employment relationship, traditionally one in admiralty, regulated in virtually all aspects by federal maritime law, involving seamen who are wards of admiralty, and has subjected this employment to state labor laws when none of the employees works in the state. How this can be done where all of the seamen's work is aboard vessels plying the high seas, and where most (57%) do not even reside in Texas, is not explained. Under the circumstances, the majority's conclusion is neither practical nor realistic.

In my view, the original majority panel decision in this case is correct and should be reaffirmed. Under the circumstances, I dissent.

JOHN R. BROWN, Chief Judge, in which DYER, Circuit Judge, joins, concurring in the dissent of Judge AINSWORTH.

Because I think this is an ideal case for the exercise of the primary jurisdiction by the NLRB, I would rather see this Court defer its decision and require the parties to present to the Board for its determination the issue—whether the Texas right to work provisions should apply under the 14(b) exception to § 8(a)(3) of the National Labor Relations Act—to this agency shop contract. Since the Court is not so disposed, I concur fully without reservation in the dissent.

The Court's opinion misplaces the emphasis of the Taft-Hartley Act[1] and this flaw in the ointment pervades the entire opinion. After tallying the almost due process-type contacts between the administration of the union agreement and the state of Texas, the Court rejects the job situs formula[2] in favor of this multiple contacts rule because it finds direction in the legislative history of the National Labor Relations Act. In addition, the Court finds persuasive evidence for its conclusion from the fact that the Texas right to work law was designed to proscribe precisely this kind of agency shop agreement and to apply to these kinds of workers.[3]

After first agreeing that the legislative history of the statute has no express answers for this problem (see Court opinion page 746), the Court concludes that the job situs doctrine is, in any case, an improper rule of thumb because the intent of Congress in adopting the Taft-Hartley Act was to eliminate the much-abused *hiring* monopoly of the closed shop system. But the fallacy here —as pointed out by the dissent—is that the adoption of § 14(b) was unrelated to this goal. Instead, it was § 8(a)(3) of the Labor Management Relations Act[4] that served this purpose.

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1. 29 U.S.C.A. § 151.

2. Northland Greyhound Lines, Inc., 80 NLRB No. 60 (1948); Western Electric Co., Inc., 84 NLRB No. 111 (1949).

3. This argument appears to beg the question. Undoubtedly Texas right to work laws do apply to employment relations within the state but whether these seamen fit that category is precisely the question here.

4. 29 U.S.C.A. § 158(a)(3) that reads:
(a) It shall be an unfair labor practice for an employer—
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or

Section 8(a)(3) expressly sanctions as a matter of federal policy union shop agreements with the important limitation that such agreements will not be valid "as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law."[5] While noting this "tension" between federal and state policy, the Court starts and finishes with the tacit assumption that the Court must find *some* applicable state law—almost in a conflicts-of-law analysis. The basis for that assumption is in no way

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discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

In addition to eliminating serious abuses of compulsory unionism, the legislative history indicates that Congress sought to "ensure the equal financial contribution of all employees who share in the benefits of union accomplishments through collective-bargaining." 11 Hous. L. Rev. 709, 711 (1974).

5. 29 U.S.C.A. § 164(b) (1973).

discernible from the Act itself or its legislative history. Instead, the emphasis of the Act is that union security agreements are of such importance that absent state proscription outlawing union shop employment relationships within that state, they will be favored. The job situs rule, though never before applied in precisely this situation,[6] is merely a logical distillation of § 14(b). For that reason I think we should follow it here as did the panel.[7]

Although I do concur fully in the dissenting opinion of Judge Ainsworth, under the circumstances I believe that it would be better administration and more consistent with sound legal principles for the Court to refer this case to the NLRB under the doctrine of primary jurisdiction. This is so because essentially the question here is whether state right to work amendments should be applied to this union contract under the National Labor Relations

6. In its attempt to distinguish the previous job situs cases, the Court makes what appears to be an erroneous distinction. While it is true that *Northland Greyhound Lines, Inc.* and *Western Electric Co.* (see note 2, *supra*) were concerned with the application of state right to work laws to workers employed in *more* than one state, in order to determine which state's law should apply to a multi-state contract, some state had to meet the criteria of 14(b). For that reason it is irrelevant whether the Board was selecting among several competing states or determining the appropriate application of one state's law. Therefore, we should consider the formula developed by the Board in those cases for they are highly relevant to the case at bar.

For example, in *Northland* the "headquarters of the employees * * * the focal points of the employment relationship" were defined as a place "where employees report to work, receive their instructions, and are paid their salaries." One benefit of this test, noted by the Board was that it would diminish the extraterritorial effect of the laws of any one state. 80 NLRB 288, 291 (1948). Also, in *Western Electric Co.* the NLRB applying this *Northland* test determined that the employees would be considered headquartered at their job site. 84 NLRB 1019, 1022 (1949).

7. Mobil Oil Corp. v. Oil, Chemical and Atomic Workers International Union, 5 Cir., 1973, 483 F.2d 603.

Act. The Supreme Court has approved[8] and this Court[9] has committed itself to this procedure repeatedly under various circumstances.

Two of the most significant instances were FPC cases where we ordered reference to the Commission for it to decide whether it had jurisdiction over the sale and purchase of royalties.[10] The Commission held that it did. It then went to the D. C. Circuit where it determined that the FPC was in error and did not have jurisdiction.[11] The significant thing here is that a Court may and often should refer basic statutory construction problems—including even the agency's jurisdiction—to the agency for its initial determination as to its own jurisdiction.

In addition the *Southwestern Sugar & Molasses Co.* case[12] is instructive on the scope and use of primary

8. Mitchell, Cole & Coke Co. v. Pennsylvania R. Co., 230 U.S. 247, 33 S.Ct. 916, 57 L.Ed. 1472; General American Tank Car Corp. v. El Dorado Terminal Co., 1939, 308 U.S. 422, 60 S.Ct. 325, 84 L.Ed. 361; United States v. Western Pacific R. R. Co., 1956, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed.2d 126; Far East Conference v. United States, 1951, 342 U.S. 570, 72 S.Ct. 492, 96 L.Ed. 576; Southwestern Sugar & Molasses Co. v. River Terminals Corp., 1959, 360 U.S. 411, 79 S.Ct. 1210, 3 L.Ed.2d 1334, 1959 AMC 1631.

9. Agricultural Transportation Association of Texas v. King, 5 Cir., 1965, 349 F.2d 873; Carter v. American Telephone & Telegraph Co., 5 Cir., 1966, 365 F.2d 486, 497; River Terminals Corp. v. Southwestern Sugar & Molasses Co., 5 Cir., 1958, 253 F.2d 922, 1958 AMC 1534 (after remand, 5 Cir., 1960, 274 F.2d 36, 1960 AMC 2064); Weymouth v. Colorado Interstate Gas Co., 5 Cir., 1966, 367 F.2d 84; J. M. Huber Corp. v. Denman, 5 Cir., 1966, 367 F.2d 104.

10. Weymouth v. Colorado Interstate Gas Co., 5 Cir., 1966, 367 F.2d 84, 102-103; J. M. Huber Corp. v. Denman, 5 Cir., 1966, 367 F.2d 104, 111-112.

11. Mobil Oil Corp. v. FPC, D.C. Cir., 1971, 149 U.S. App. D.C. 310, 367 F.2d 256, cert. denied, 406 U.S. 976, 92 S.Ct. 2409, 32 L.Ed.2d 676.

12. 253 F.2d 922, 1958 AMC 1534.

jurisdiction. There this Court referred an issue on the construction of the Interstate Commerce Act to the ICC. While the Supreme Court reversed this procedure because it thought that other issues should be reached first, they affirmed expressly in a very elaborate opinion that our primary jurisdiction reference was entirely proper and within the Court's power.[13] On remand the panel decided it on the merits and reached a result that made consideration by the administrative agency unnecessary.[14]

Primary jurisdiction is particularly invaluable for this case because, however, one may view the merits, it is acknowledged that the record below is inadequate to enable this Court to determine what, if any, partial remedies would be appropriate. (See Court's opinion page 758). Where 57% of the employees covered by this agreement are not Texas residents, further findings of fact and exploration of alternative remedies would certainly appear to be mandated. No matter how it is sliced the Court is trying to divine congressional policy for a situation never before faced in accommodating § 8(a)(3) and § 14(b). That policy should first be explored by the agency charged with responsibility for administering the Act which contains as an integral part the quasi-judicial machinery for hearing and deciding cases by formal opinions which, until overruled by a competent Court, become as authoritative as the words of the Act.

It is not abdication—indeed it is performance of judicial duty in the highest sense—for us to defer to the NLRB the initial determination of the interpretation of the Act under the circumstances of this industrial situation.

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13. Southwestern Sugar & Molasses Co. v. River Terminals Corp., 1959, 360 U.S. 411, 421, 79 S.Ct. 1210, 3 L.Ed.2d 1334, 1959 AMC 1631.

14. 5 Cir., 1960, 274 F.2d 36, 1960 AMC 2064.

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3272

MOBIL OIL CORPORATION, ET AL.,
Plaintiffs-Appellees,

versus

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION, AFL-CIO, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Texas

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(August 10, 1973)

Before THORNBERRY, AINSWORTH and RONEY, Circuit Judges.

AINSWORTH, Circuit Judge: This suit was brought by Mobil Oil Corporation Marine Transportation Depart-

ment, Gulf-East Coast Operations [Employer] against the Oil, Chemical and Atomic Workers International Union AFL-CIO and Maritime Local No. 8-801 of that Union [Union] for a declaratory judgment under section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), (c) and 28 U.S.C. § 2201. It concerns the validity of an agency shop clause contained in a collective bargaining agreement between Employer and Union, which clause is in apparent conflict with Texas right-to-work laws.[1] The district court held that the Texas laws should take precedence, and rendered a declaratory judgment in favor of Employer, holding the agency shop clause void and unenforceable.

Union appeals, presenting a number of issues which we summarize as follows:

1) that this is an exceptional case where the N.L.R.B. should have primary jurisdiction and preempt judicial proceedings because the employees are seamen who work exclusively aboard deep sea tankers engaged in coastwise

1. Vernon's Ann. Civ. St. Art. 5154g, Section 1:
"It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not be denied or abridged on account of membership or nonmembership in any labor union or labor organization and that in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion."
Vernon's Ann. Civ. St. Art. 5207a, Section 2:
"No person shall be denied employment on account of membership or nonmembership in a labor union."
Vernon's Ann. Civ. St. Art. 5154a, Section 8a:
"It shall be unlawful for any labor union, any labor organizer, any officer, any agent or representative or any member of any labor union to collect, receive or demand, directly or indirectly, any fee, assessment, or sum of money whatsoever, as a work permit or as a condition for the privilege to work from any person not a member of the union; provided, however, this shall not prevent the collection of initiation fees as above stated."

commerce and some foreign commerce. Alternatively, that in the exercise of sound discretion the court should have declined to render a declaratory judgment;

2) that the district court erred in applying Texas right-to-work statutes to all its covered employees; and

3) that there is no case or controversy and the dispute was not ripe for declaratory judgment.

We hold that a controversy existed, that jurisdiction properly vested in the district court, and that there was no abuse by that court in declining to defer to N.L.R.B. jurisdiction. We further hold that the agency shop clause is valid and enforceable with respect to all employees covered by the collective bargaining agreement.

Sections 7 and 8(a)(3) [29 U.S.C. §§ 157, 158(a)(3)] of the Labor Management Relations Act specifically authorize a union shop, wherein employment is contingent on membership in a union.[2] These sections have been in-

2. 29 U.S.C. § 157:
"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title."
29 U.S.C. § 158:
"(a) It shall be an unfair labor practice for an employer—
. . . .
(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor prac-

terpreted to authorize an agency shop, which is a union security agreement conditioning employment, in lieu of actual union membership, on the payment of regular union dues and initiation fees. *N.L.R.B. v. General Motors Corporation,* 373 U.S. 734, 738-739, 83 S.Ct. 1453, 1457 (1963); *Retail Clerks Inter. Ass'n. v. Schermerhorn,* 373 U.S. 746, 751-752, 83 S.Ct. 1461, 1464-1465 (1963).

The agency shop clause involved here states:

> "For the duration of the Agreement all employees hired shall, as a condition of employment, become members of the Union and/or in the alternative pay the regular union dues and initiation fees within 31 days from the employment date."

Despite the provisos in sections 7 and 8(a)(3), recognizing the validity of union security agreements, section 14(b) of the Taft-Hartley Act [29 U.S.C. § 164(b)] provides that such agreements must give way to state law where the state prohibits the conditioning of employment upon union membership.[3] Such a prohibition is expressed in Texas' right-to-work laws and it is conceded that these Texas statutes bar an agency shop clause.[4]

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tice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later. . . ."

3. 29 U.S.C. § 164:

. . . .

"(b) Nothing in this subchapter shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial Law."

4. The Texas Attorney General has so ruled in his Opinion No. WW-1018.

Mobil Oil Corporation is a New York corporation. Employer is a division of Mobil's Marine Transportation Department and has its headquarters in Beaumont, Texas. Prior to 1962 the headquarters were in New York. It operates eight oceangoing tankers, which ply the waters of the East and Gulf Coasts of the United States, principally between the State of Texas and the State of New York. It employs unlicensed seamen from various states. Of a total of 289 employees, 123 have reported that Texas is their state of residence. Further, a total of 152 out of 289 have requested Employer to list Beaumont, Texas, as their shipping port.[5] All of the work performed by the seamen here is aboard ships and the men have no shore duties. They are usually paid in cash, generally at a northern port such as New York or Providence. At the Beaumont, Texas, headquarters payroll records are kept and various bookkeeping functions are performed including the withholding of federal income and FICA taxes and collection of union dues. Unemployment taxes are paid only to the State of Texas. Of the hiring of employees, 60 per cent occurs in Beaumont and 40 per cent at New York.

Union is the exclusive collective bargaining representative of the unlicensed seamen employed on Employer's tankers. The collective bargaining agreement, the subject of this controversy, was negotiated and executed in the State of New York. It was prepared in final form and retyped in Texas. Since 1942, a year after Union's certification to Mobile, labor contracts for the employee unit involved have been negotiated in New York. Present negotiations for a successor contract have been taking place in New York.

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5. There are 60 employees residing in New York, 21 in New Jersey, 16 in Florida, 13 in Louisiana, 10 in Maine, 10 in Rhode Island, and 36 other employees in 16 other states or territories.

The district judge found that a more substantial part of the administration of the collective bargaining agreement occurred in Texas than in any other state, and held that the enforcement or attempted enforcement by the Union of the agency shop clause directly involves the Company's Texas employees, as well as activities and administration of the agreement in Texas, in contravention of the Texas right-to-work laws. He therefore declared the clause to be void and unenforceable.

THE PREEMPTION ISSUE

Union concedes that generally N.L.R.B. preemption will not prevail in a section 301 suit, but contends that in exceptional cases such as this involving extraterritorial problems, the district court should have declined jurisdiction. We disagree.

While section 301 of the Labor Management Relations Act is applicable to suits for violation of contracts,[6] this section has been broadly construed to encompass suits invoking the judicial process for determination of the validity of a collective bargaining agreement, *El Paso*

6. 29 U.S.C. § 185:

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

. . . .

"(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members."

Bldg. & Const. Tr. Coun. v. El Paso Chap. Assoc. Gen. Con., 5 Cir., 1967, 376 F.2d 797, as well as suits seeking a declaration of various rights and obligations of parties to such contracts, *Allied Oil Workers Union v. Ethyl Corporation*, 5 Cir., 1965, 341 F.2d 47. The Supreme Court has approved the deliberate choice of Congress to leave the enforcement of collective agreements "to the usual processes of the law." *Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 513, 82 S.Ct. 519, 526 (1962). We observe no exceptional circumstances here which justify N.L.R.B. preemption of a proceeding clearly within the contemplation of section 301.

THE CASE OR CONTROVERSY ISSUE

Nor do we agree with appellants that the dispute has not ripened to a present case or controversy. On April 23, 1970, five months subsequent to the execution of the present collective bargaining agreement, Employer wrote to Union stating that the agency shop clause of the contract "is invalid under Texas law" and evidencing Employer's intention to require new employees to sign a certificate which would advise them that union membership would be on a purely voluntary basis. The policy was effectuated and new employees were so advised. Union made no response to Employer's letter. In July 1971, however, Union in a newsletter to its members wrote that

> "As far as this Union is concerned any employee in our division of Mobil will either join our Union or pay dues to the Union. We intend to exercise our right to have the employment of any unlicensed seaman terminated who does not join or pay dues to the Union. We hope this answers all questions regarding this point."

Employer obtained a copy of the newsletter and shortly thereafter filed this complaint to declare the agency clause invalid.

Whether a case or controversy is presented must be determined on a case-by-case basis.

> "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment."

Maryland Casualty Co. v. Pacific Coal & Iron Co., 312 U.S. 270, 273, 61 S.Ct. 510, 512 (1941).

Applying these principles to this case, we have no difficulty concluding that a substantial controversy involving diametrically opposed interests between Union and Employer existed. Union intended to enforce its agency shop policy; Employer, on the other hand, intended to abolish it, and each party was aware of the intentions of the other. The complaint was, therefore, not premature.

THE VALIDITY OF THE AGENCY SHOP CLAUSE

This is a case of first impression. We have found no direct authority bearing on the issue involved. Employer contends in essence that the law of Texas is predominant because it is the locale of Employer's headquarters, the state in which (compared to the other states) the greater number of significant transactions and contacts occur, and the state in which a more substantial part of the administration and performance of the collective bargaining agreement occurs. Union contends that the situs of the

employees' work, the high seas, is determinative, and that Texas state law is therefore inapplicable. Reliance is placed on *Western Electric Co., Inc.*, 84 N.L.R.B. No. 111 (1949) and *Northland Greyhound Lines, Incorporated*, 80 N.L.R.B. No. 60 (1949), in support of Union's contention.

In *Western Electric*, the Union (Communication Workers of America, CIO, Installation Division #6) petitioned for a union-shop election. The Board was called upon to determine an appropriate unit of mobile telephone installation employees who performed their work in the District of Columbia and 45 states, some of which prohibited union security. The Board determined the appropriate unit to include only members of the contract unit subject to state laws which did not prohibit the union shop. In deciding the applicable state law by which the members would be governed, the Board used as a criterion the headquarters of the individual workers, and relied on its prior decision in *Northland Greyhound Lines, Inc.*, 80 N.L.R.B. No. 60 (1949). In *Northland Greyhound*, the Board held that "headquarters" are "where the employees report to work, receive their instructions, and are paid their salaries." The Board in *Western* held that the headquarters of the installation employees appeared "to be at their job site, as that is where they report for work, receive their instructions, and are paid their wages." Accordingly, the Board considered each employee "to be subject to the law of the State in which his job site is located," and excluded "all employees whose job sites are located in States which prohibit union-shop agreements" from the unit.

Union contends that *Western Electric* recognizes employee job situs as the test for deciding the law applicable

to an agency shop clause in a collective bargaining agreement. Employer contends that *Western Electric* and *Northland Greyhound* do not bind this Court and distinguishes them on their facts, pointing out that neither the hiring or firing nor the managerial activity or other incidents of employment occurred in one state alone, as in the present case. Employer further contends that if any rule can be gleaned from these cases it is a rule establishing "headquarters" of employees as the proper criterion as opposed to "job situs" but that in either event the State of Texas meets both criteria.[7] In *Western Electric* and *Northland Greyhound* the Board apparently believed that "headquarters" and "job situs" were more or less equivalent under the facts of those cases. The matter before us presents a more complex question. Unlike the cited Board cases, in which headquarters coincided with jobsites in various states, in this case we have only one headquarters, in Texas, with job situs not in individual states but on the high seas.

In the cited N.L.R.B. cases, the Board solved the problem by recommending separate units which would be sub-

7. Employer contends that if Board action is to be accorded any weight, a recent decision by a Board Trial Examiner supports its contention that a state's right-to-work laws should apply to seafaring employees shipping through a port in that state, citing Seafarers Int. Union of No. America, Case No. 23-CB-1222 (N.L.R.B. March 30, 1972), an unfair labor practice case. Subsequent to the decision of the Trial Examiner (now Administrative Law Judge), the National Labor Relations Board, in reviewing that decision, expressly refused to pass on the Administrative Law Judge's findings and conclusions with respect to the application of the Texas right-to-work law. The Board said: "The Administrative Law Judge based his finding that Respondent violated Section 8(b)(1)(A) and (2) of the Act on the effect of Texas' right-to-work law on Charging Party James Moyles' obligation to pay dues. While we agree that Respondent violated . . . the Act, we do so only for the reasons enumerated herein." Seafarers International Union of North America, Atlantic, Gulf, Lakes & Inland Waters District, et al., 202 N.L.R.B. No. 91.

ject to the laws of the respective states in which the employees were headquartered, that is, the state in which most of their employment contacts occurred, the state in which they were working. In the present case, the operation being sea-based, with work performance occurring on the high seas, we are unable to reach a solution as simple as that employed by the Board.

Conceding, arguendo, that the district court correctly found that a more substantial part of the administration and performance of the collective bargaining agreement occurs in the State of Texas than in any other state, such a finding is not decisive of the issues in this case. In making such a finding the district judge took into consideration various facts associated with Texas, and acts occurring therein, thereby weighing the interests of Texas against other states. In so doing the court failed to give proper consideration to the most important factor in the case, that is, the situs of the work performance of the covered employees. The trial judge, in written factual findings, held in this regard that

> "Substantially all of the employees' work time is spent aboard Plaintiff's tankers, and such vessels are located on the high seas or in ports other than ports located in the State of Texas approximately 80% to 90% of the time, but at any given point in time one of the vessels generally is located in Texas or Texas waters."[8]

8. Union points out in its brief, extracting information from vessel logs, that the vessels making typical trips touching the port of Beaumont, for example, the MOBIL ARROW, the MOBIL ECLIPSE, the MOBIL FUEL, and the MOBIL GAS, for a period of time in May and June 1972 were in the port of Beaumont only 5.5 per cent of the total time involved. Adding to this example the time of the MOBIL LUBE in May, June and part of July 1972, during which time the vessel did not touch Beaumont at all, our own rough calculation

Use of Employers' headquarters as the decisive criterion in this case would allow an employer to make an arbitrary choice, and could produce bizarre consequences. Headquarters could be shifted about by large national companies to states with favorable labor laws, such as the right-to-work statutes. The purpose of sections 7 and 8 of the Labor Management Relations Act or of section 14(b) of the Taft-Hartley Act, the applicable statutes here, could easily be defeated. Under the facts of this case the job situs of the employees is the most important and logical factor. As the Union has pointed out to us, Mobil's top headquarters is in New York, and prior to 1962 its Marine Transportation Department was likewise headquartered in New York. Thus, as the Union states, the change in headquarters from New York to Beaumont did not substantially change the working location of the men which remained the same.

Through the collective bargaining agreement, the parties thereto agreed to an agency shop clause. This type of membership is authorized by sections 7 and 8 of the Labor Management Relations Act unless forbidden by state law applicable to these circumstances. The location of Employer's headquarters and predominance of Texas contacts over any other state do not mandate a conclusion that the employees are Texas employees. State right-to-work laws are applicable only to employees of that particular state. The employees involved here are not for

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shows that time in the port of Beaumont was a mere 4 percent of the total time involved.

Many of the trips do not even touch a Texas port. For example, eight times a year a vessel makes a trip from the East Coast to Puerto Rico and return. The MOBIL LUBE, referred to above, was at the time of trial en route to Guam on a 6-month charter, and had not been in a Texas port for 50 days, yet the members of that crew were also covered by the labor agreement.

the purpose of their collective bargaining agreement employees of Texas or any other state—they are mobile, maritime employees, whose principal place of employment, or jobsite, is on the high seas.

The district court was called upon to determine the validity of a portion of the collective bargaining agreement, the agency shop clause. Our sole duty is to decide whether that determination was erroneous. We cannot rewrite the contract; that is the prerogative of the parties to the agreement through the negotiating machinery by which they are bound. Nor can we compel concessions or otherwise impose our views of a desirable settlement. *N.L.R.B. v. Insurance Agents' International Union,* 361 U.S. 477, 487, 80 S.Ct. 419, 426 (1970); *National Labor Relations Board v. American Nat. Ins. Co.,* 343 U.S. 395, 404, 72 S.Ct. 824, 829 (1952); *M.R.&R. Trucking Company v. N.L.R.B.,* 5 Cir., 1970, 434 F.2d 689, 695. *See also H. K. Porter Co., Inc. v. N.L.R.B.,* 397 U.S. 99, 90 S.Ct. 821 (1970)

When the parties to the collective bargaining agreement freely chose to be covered by an agency shop clause we must infer that they intended to be bound by their contract. They "cannot be presumed to have contemplated a law which would defeat their engagement." *Pritchard v. Norton,* 106 U.S. 124, 137, 1 S.Ct. 102, 112 (1882).[9] If there is to be a change, it must be the result of further negotiations.

REVERSED.

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9. *See also* Dailey v. Transitron Electronic Corp., 5 Cir., 1973, 475 F.2d 12 [No. 72-3323, March 15, 1973]; Teas v. Kimball, 5 Cir., 1958, 257 F.2d 817, 823.

THORNBERRY, Circuit Judge, dissenting:

I concur in the majority's decision on all issues except the last one, the validity of the agency shop clause; I would hold that the district court properly applied Texas law and declared the clause invalid.

In terms of the language of § 14(b) of the Taft-Hartley Act[1] the issue is whether the collective bargaining agreement between the employer and the union applies to "employment in any state" whose right-to-work laws would invalidate the agency shop clause, i.e. whether the agreement applies to "employment in" Texas. As the majority opinion points out, the problem of deciding where the "employment" is located when the situs of the work performed is not the same as the location of the employer's headquarters or the place where the employees are hired and fired is one which we encounter here for the first time. The majority apparently accepts the district court's approach to the problem, which entails examining and weighing the various contacts of the employer and its employees with the state whose laws are said to apply, but it disagrees with the district court's conclusion that the employment contacts with Texas were sufficient to warrant considering the employment to be "in" that state. Reversal is predicated primarily on the conclusion that "[u]nder the facts of this case the job situs of the employees is the most important and logical factor."

I, too, accept the district court's significant-contacts approach, but would hold the district court properly concluded under it that the collective agreement in this case applied to "employment in" Texas. Beyond noting the location of the employer's headquarters in Texas, the

1. § 14(b) is quoted in note 3 to the majority opinion.

district court found that the employer "employs, or approves the employment of, all unlicensed seamen at its headquarters in Beaumont, Texas." Pay records are maintained in Texas and funds are placed on board the ships at Texas ports for disbursements to the employees. All final hiring decisions are made in Texas, and unemployment taxes are paid to the State of Texas. Finally, a majority of the employees list Beaumont as their shipping port, and almost half reside in Texas. These contacts with Texas seem to me more than sufficient to give that State a strong interest in applying its laws to the collective agreement between the employer and the union and to warrant considering the employment to be "in" Texas within the meaning of § 14(b).

The majority argues that if location of the employer's headquarters were regarded as the decisive criterion, employers might choose headquarters locations in states with right-to-work laws and thereby defeat national labor policy. In response, it should be pointed out initially that the district court did not designate the location of the employer's headquarters as the decisive factor, but considered the full range of employer and employee contacts with Texas. More basically, an employer's choice of a location for its headquarters to obtain the benefit of local right-to-work laws would not contravene national labor policy. Section 14(b) of the Taft-Hartley Act expressly permits states to enact and apply right-to-work laws, and it certainly implies no limitation on employer's freedom to choose to locate in any of the various states. The effect of the majority's opinion is to carve out collective bargaining contracts between maritime employers and employees as a special class, not subject to state laws in the same way that, for example, collective contracts between

an interstate trucking or busing business with its employees would be. The majority's emphasis on the geographical situs of work performed outside the state's boundaries seems to me to unduly discount other substantial aspects of the employment relationship, and I do not discern a basis in the statute or in national labor policy for the maritime exemption which the majority establishes.

APPENDIX C

Section 14(b), 29 U.S.C.A. 164(b).

Nothing in this Act shall be construed as authorizing the execution or application of agreements requiring membership in a labor organization as a condition of employment in any State or Territory in which such execution or application is prohibited by State or Territorial law.

Section 8(a)(3), 29 U.S.C.A. 158(a)(3).

* * *

(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided,* That nothing in this subchapter, or in any other statute of the United State, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make

such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership.

Art. 5154g, Vernon's Annotated Civil Statutes.

Section 1. It is hereby declared to be the public policy of the State of Texas that the right of persons to work shall not be denied or abridged on account of membership or non-membership in any labor union or labor organization and in the exercise of such rights all persons shall be free from threats, force, intimidation or coercion.

Art. 5207a, Vernon's Annotated Civil Statutes.

Section 2. No person shall be denied employment on account of membership or nonmembership in a labor union.

Art. 5154a, Vernon's Annotated Civil Statutes.

Section 8a. It shall be unlawful for any labor union, any labor organizer, any officer, any agent or representative or any member of any labor union to collect, receive or demand, directly or indirectly, any fee, assessment, or sum of money whatsoever, as a work permit or as a condition for the privilege to work from any person not a member of the union; provided, however, this shall not prevent the collection of initiation fees as above stated.

APPENDIX D

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

CIVIL NO. 7413

MOBIL OIL CORPORATION, MARINE TRANSPORTATION DEPARTMENT, GULF-EAST COAST OPERATIONS, Plaintiff

v.

OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AFL-CIO and MARITIME LOCAL NO. 8-801 OF OIL, CHEMICAL AND ATOMIC WORKERS INTERNATIONAL UNION AFL-CIO, Defendants

FINDINGS OF FACT

1.

Mobil Oil Corporation, Marine Transportation Department, Gulf-East Coast Operations, the Plaintiff herein, operates eight (8) oceangoing tankers documented under the laws of the United States.

2.

Defendant Maritime Local No. 8-801 of Oil, Chemical and Atomic Workers International Union AFL-CIO, which is affiliated with Defendant Oil, Chemical and Atomic Workers International Union, AFL-CIO, is the exclusive collective bargaining representative of all unlicensed seamen employed on board Plaintiff's tankers.

3.

Mobil Oil Corporation, Marine Transportation Department, Gulf-East Coast Operations, which is the Plaintiff herein, has its management headquarters in Jefferson County, Texas and has been so located since April 1,

1962. Mobil Oil Corporation is a New York corporation and has qualified to do business in the State of Texas.

4.

Defendant Maritime Local No. 8-801 of Oil, Chemical and Atomic Workers International Union, AFL-CIO maintains offices in Beaumont, Texas and in New York, New York.

5.

Plaintiff and Defendants negotiated a collective bargaining agreement in the State of New York to be effective from November 1, 1969 to July 31, 1972.

6.

A draft of the collective bargaining agreement dated November 1, 1969 was executed in the State of New York.

7.

The collective bargaining agreement was typewritten and prepared in final form and re-executed in the State of Texas.

8.

The State of Texas collects unemployment compensation insurance payments on all personnel employed on board Plaintiff's tankers, regardless of the designation of home address or shipping port.

9.

Payments of unemployment compensation insurance have been made to the State of Texas since April 1, 1962 on account of all personnel employed on board Plaintiff's tankers.

10.

Two Hundred eighty-nine (289) unlicensed seamen are employed by Plaintiff.

11.

One hundred twenty-three (123) unlicensed seamen

out of two hundred eighty-nine (289) have reported to Plaintiff that Texas is their State of residence.

12.

One hundred fifty-two (152) unlicensed seamen out of two hundred eighty-nine (289) have requested Plaintiff to list Beaumont, Texas as their shipping port.

13.

Payroll records are maintained in Texas for all personnel employed on board Plaintiff's tankers, and Plaintiff places funds on board its tankers in Texas for use in paying wages due to personnel employed on board Plaintiff's tankers.

14.

Plaintiff makes remittances in Texas of F.I.C.A. taxes as well as federal income taxes withheld from the pay of all personnel employed on board Plaintiff's tankers.

15.

Plaintiff employs, or approves the employment of, all unlicensed seamen at its headquarters in Beaumont, Texas.

16.

Plaintiff makes monthly remittances of union dues deducted pursuant to authorization from the wages of unlicensed seamen, with such remittance being mailed by Plaintiff from Texas to the New York office of Defendant Maritime Local No. 8-801 of Oil, Chemical and Atomic Workers International Union, AFL-CIO.

17.

All grievances filed on approved grievance forms by unlicensed seamen employed on board Plaintiff's tankers are submitted to and considered by Plaintiff's manager at his office in Beaumont, Texas.

18.

All of the unlicensed seamen employed on board Plain-

tiff's tankers are regularly present in the State of Texas inasmuch as Plaintiff's tankers are on voyages beginning or ending at Texas ports in their normal trade.

19.

At all times some of the unlicensed seamen employed by Plaintiff are in the State of Texas, either on board tankers operated by Plaintiff or on paid vacation receiving pay from Plaintiff.

20.

A more substantial part of the administration of the collective bargaining agreement and the performance thereof occurs and takes place in the State of Texas than in any other State.

21.

The acts performed in the State of Texas in the administration and performance of the collective bargaining agreement are such that the State of Texas is intimately concerned with the collective bargaining agreement and with the employees working thereunder.

22.

Plaintiff advised Defendants that the agency shop clause of the collective bargaining agreement is unlawful and invalid because of violation of the Texas right-to-work statutes, and Plaintiff advised the personnel employed on board Plaintiff's tankers that membership in labor unions is voluntary.

23.

Defendants rejected Plaintiff's position and issued written notice in July, 1971 to unlicensed seamen employed on board Plaintiff's tankers stating that membership in Defendant Maritime Local No. 8-801 of Oil, Chemical and Atomic Workers International Union, AFL-CIO, or payment of dues to Defendant Maritime Local No. 8-801

of Oil, Chemical and Atomic Workers International Union, AFL-CIO, is a condition of their employment and that Defendants will cause any non-complying employees to be fired.

24.

A bona fide controversy exists between the parties with respect to the validity of the agency shop clause (Article I, ¶2b) in the collective bargaining agreement between Plaintiff and Defendants.

25.

The enforcement or attempted enforcement by Defendants of the agency shop clause (Article I, ¶2b) in the collective bargaining agreement directly involves Plaintiff's employees in the State of Texas.

CONCLUSIONS OF LAW

1.

An actual bona fide controversy exists between the parties so as to give the Court jurisdiction of this cause under §301 of the Labor-Management Relations Act of 1947, as amended (29 U.S.C., §185(a) and (c), for the purpose of securing declaratory judgment pursuant to the Federal Declaratory Judgment Act (28 U.S.C., §2201).

2.

The controversy is not moot.

3.

The statutory procedure before the National Labor Relations Board does not preclude the Court's consideration of the issues in this case or prevent the Court from entering a declaratory judgment herein.

4.

The Texas right-to-work statutes have not been pre-

empted by the Labor-Management Relations Act of 1947, as amended, and the validity of the Texas right-to-work statutes with respect to the execution or application of a collective bargaining agreement with an agency shop clause is upheld by Sec. 14(b) of the Labor-Management Relations Act of 1947, as amended (29 U.S.C. §164(b).

5.

The application and attempted application of the agency shop clause (Article I, ¶2b) of the collective bargaining agreement to all of Plaintiff's operations and employees contravenes the Texas right-to-work statutes, being §8a of Article 5154a; §2 of Article 5207a; §1 of Article 5154g, Vernon's Annotated Civil Statutes.

6.

The agency shop clause (Article I, ¶2b) of said collective bargaining agreement is void and unenforceable. *Accord*, Opinion No. WW-1018 of the Texas Attorney General issued on March 14, 1961.

7.

The agency shop clause (Article I, ¶2b) of said collective bargaining agreement is severable and its invalidity does not affect the remaining provisions of the contract.

8.

Plaintiff is entitled to the relief sought, and judgment should be entered accordingly.

SIGNED and ENTERED this 12th day of July, 1972.

/s/ Joe J. Fisher
Chief Judge, United States
District Court

AMENDED FINDINGS OF FACT

Defendants' Motion for Amended Findings is hereby granted in part, and this Court's "Memorandum with Findings of Fact and Conclusions of Law" as signed and entered on July 12, 1972 is amended and supplemented as follows:

(a) Between Finding of Fact No. 18 and 19 there shall be added a new Finding of Fact, numbered 18(a) which shall state as follows:

> "Substantially all of the employees' work time is spent aboard Plaintiff's tankers, and such vessels are located on the high seas or in ports other than ports located in the State of Texas approximately 80% to 90% of the time, but at any given point in time one of the vessels generally is located in Texas or Texas waters."

AMENDED CONCLUSION OF LAW

(b) The Conclusion of Law No. 5 shall be amended so as to add the words "any or" immediately prior to the words "all of Plaintiff's operations and employees". As amended said Conclusion of Law No. 5 will read:

> "The application and attempted application of the agency shop clause (Article I, ¶2b) of the collective bargaining agreement to any or all of Plaintiff's operations and employees contravenes the Texas right-to-work statutes, being §8a of Article 5154a; §2 of Article 5207a; §1 of Article 5154g, Vernon's Annotated Civil Statutes."

RENDERED and SIGNED this 14th day of August, 1972.

/s/ Joe J. Fisher
Judge Presiding

JUDGMENT

(Number and title omitted) (Filed: July 12, 1972)

This action came on to be tried before the Court and the evidence adduced by the parties having been heard and the Court having made its findings of fact and conclusions of law:

It is hereby, ORDERED, DECLARED and ADJUDGED that:

1.

Article I, ¶2b of the collective bargaining agreement dated November 1, 1969 between Plaintiff and Defendants, reading as follows:

"2. UNION SECURITY

b. For the duration of the Agreement all employees hired shall, as a condition of employment, become members of the Union and/or in the alternative pay the regular union dues and initiation fees within 31 days from the employment date.",

is void and unenforceable.

2.

Article I, ¶2b is severable from the remainder of the collective bargaining agreement and the invalidity of said Article I, ¶2b does not affect the other provisions in said contract, all of which remain in full force and effect.

3.

Costs are adjudged against the Defendants.

To which action, order and ruling of the Court Defendants then and there in open court excepted and are allowed their exceptions.

SIGNED and ENTERED this 12th day of July, 1972.

/s/ Joe J. Fisher
Chief Judge, United States
District Court